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NOTES

ON

ROMAN LAW

LAW OF PERSONS

LAW OF CONTRACTS

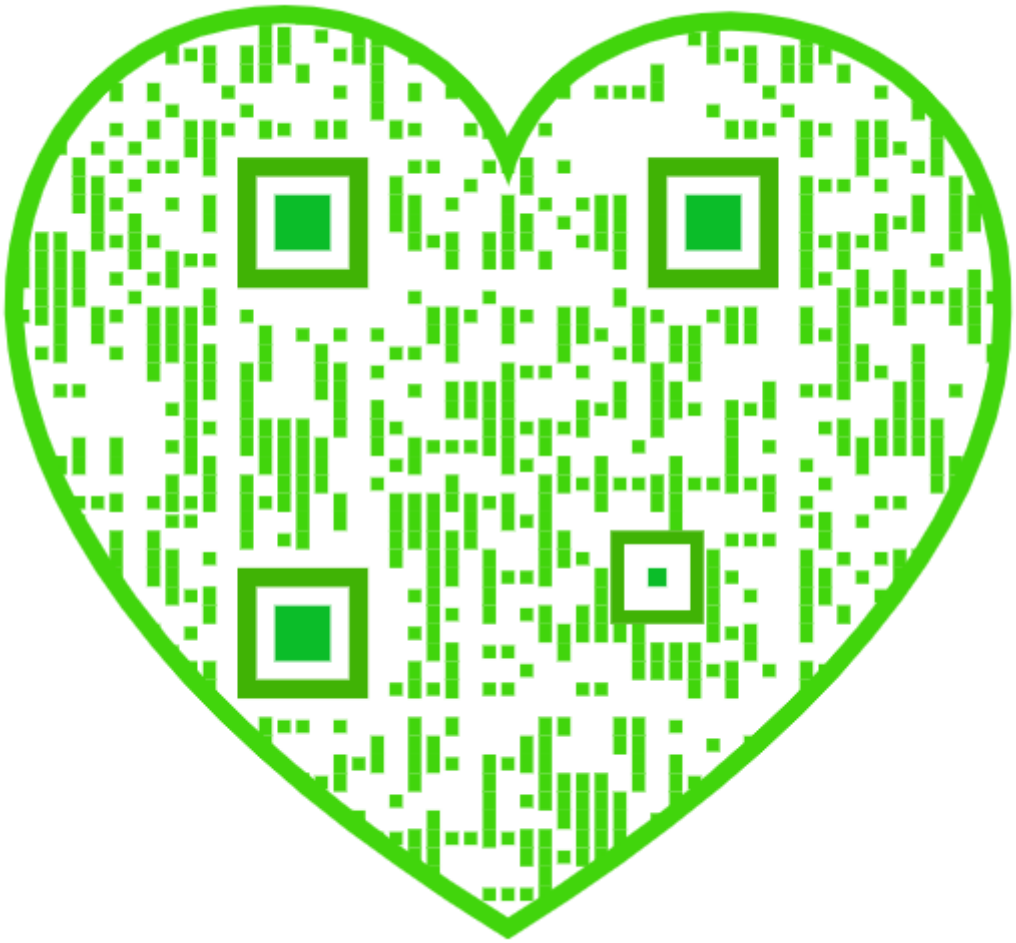
BY

JOSEPH R. LONG

Washington and Lee University

Lexington, Virginia

1912



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BY

JOSEPH R. LONG

Washington and Lee University
Lexington, Virginia

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NOTE.

These notes were prepared for the author's personal use with his classes in the subject of Roman Law in Washington and Lee University and not for general circulation. It is expected that they will be amplified, explained, and, if need be, corrected, as used in the class room. They are printed, not as being worthy of preservation in printed form, but for the more convenient use of the author's own classes. This explanation may be in order in case a copy of these fragmentary notes should fall into the hands of a stranger.

PART I. THE LAW OF PERSONS.

I. In General.

§ 1. Classification of Persons. The Roman law distinguished three kinds of personal status, or degrees of legal capacity, and classified human beings with respect thereto as follows:

1. The status of Freedom (*status libertatis*) according to which persons were either free (*liberi*) or slaves (*servi*). Free persons, again, were either freeborn (*ingenui*) or freedmen (*libertini*).

2. The status of Citizenship (*status civitatis*), according to which freemen were either Roman citizens (*cives*) or aliens (*peregrini*).

3. The status of Family (*status familiae*), according to which citizens were either independent (*sui juris*) or subject to the authority of another (*alieni juris*).

Among the Romans legal capacity was the exception, as among modern nations it is the rule. Even free persons enjoying the status of citizens were usually in some condition of subordination or dependence in respect to their family relations. The only person fully independent was the head of a family, or paterfamilias, above the age of twenty-five years.

There were several distinct states of subordination or dependence. Besides slavery, which was a state of complete subordination, there was a condition of quasi-slavery known as *mancipium*. Also, married women were under the marital power (*manus*) of their husband; children were under the paternal power (*potestas*) of their fathers; unmarried women and orphan children under the age of puberty were under

guardianship (*tutela mulierum* and *tutela impuberum*); and orphans from the age of puberty to the age of twenty-five years, and lunatics and spendthrifts were under another form of guardianship (*cura*).

Of these instances of the power of one person over another, *mancipium, manus,* and *tutela mulierum* were obsolete in the time of Justinian.

§ 2. Legal Personality—Caput—Capitis Deminutio. The notion of complete legal personality was summed up in Roman law in the term *caput* (head). The *caput* involved the three elements of freedom, citizenship, and family rights. The legal personality was destroyed by the loss of any one or more of these elements. Any such loss was a change or reduction from one's former status and was called a *capitis deminutio.* Of this there were three grades: (1) loss of liberty (*capitis deminutio maxima*). This involved also loss of citizenship and family rights. (2) Loss of citizenship (*capitis deminutio media*). This involved loss of family rights but not of liberty. (3) Loss of family rights (*capitis deminutio minima*). This was the least reduction of status and did not affect either liberty or citizenship. Let us now examine these several reductions of status a little more fully.

§ 3. Loss of Freedom (Capitis Deminutio Maxima). A Roman citizen could not legally be sold into slavery, but he might become a slave by condemnation for crime or by being captured by an enemy. With the loss of freedom the legal personality was extinguished. In the case of the capture of a Roman citizen by a hostile people, however, there was recognized what was called the *jus postliminii*, or the right of postliminium. If the captive returned from captivity he enjoyed once more, from the moment of his return, all the rights that he had lost by his capture. By the fiction of postliminium the returned captive was considered as never having been in captivity, and so far as possible, was placed in the same position

as if he had never been captured. If, however, he died in captivity, he, of course, died a slave and not a Roman citizen. This might seriously affect his family, for a slave could have no heirs nor make a will. To overcome these difficulties, the *lex Cornelia* (B. C. 81) extended the fiction of postliminium by providing that if the captive died in captivity, his death should be considered to date, not from actual moment of death, but from the moment of capture, so that although he lived a slave, he had previously died free.

§ 4. Loss of Citizenship (Capitis Deminutio Media, or Magna). A person might lose his citizenship (1) by emigrating to a Latin colony. But in Justinian's time Latin colonists and all other free members of the Roman Empire were Roman citizens, and hence this rule was then obsolete. (2) By expatriation, as by being shut out from the use of fire and water (*interdictio aquæ et ignis*). (3) By deportation to an island. This mode of punishment was introduced by Augustus to avoid the danger of allowing a crowd of banished men to meet wherever they pleased. It was banishment for life; simple banishment did not, in Justinian's time, involve loss of citizenship. (4) By desertion to the enemy.

§ 5. Loss of Family Rights (Capitis Deminutio Minima). Severance from one's agnatic family operated as a loss of personality. The Roman family consisted of the aggregate of all those who were under the same paternal power, or would be thus subject if the common ancestor were still living, and this form of relationship (agnation), unlike the natural relationship of blood (cognation), could be changed. One could sever his connection with his agnatic family, and in so doing he was said to suffer *capitis deminutio minima,* that is, the least degree of loss of personality recognized.

Such a change occurred where a woman married with manus, passing from her father's family into her husband's family; or where a father sold his son into bondage (*mancipium*), or gave him in adoption, or emancipated him; or where

a person *sui juris* was arrogated (adopted); or where the child of a concubine was made legitimate by the intermarriage of his parents, thus passing from his mother's family into his father's family.

It will be observed that in some of these cases the condition of the person might have been actually improved, as in the case of the emancipation of a son who thus became *sui juris,* or of a bastard who was made legitimate. There was usually merely a change from one family to another, new family rights being acquired in place of those lost. Nevertheless, any change was considered a loss of personality.

In addition to the loss of the old and the acquisition of new family rights, there were originally two other consequences of *capitis deminutio minima.* (1) All contractual debts of the *capite minutus* (person losing personality) were extinguished. But later the prætor granted a remedy to creditors. (2) Personal servitudes to which the *capite minutus* was entitled were extinguished. This rule was abolished by Justinian.

II. The Law of Slavery.

§ 6. In General. In the law of persons the first division is into freemen (*liberi*) and slaves (*servi*). Freedom, says Justinian, "is a man's natural power of doing what he pleases, so far as he is not prevented by force or law; slavery is an institution of the law of nations, against nature, subjecting one man to the dominion of another." The Romans thus recognized slavery as an artificial institution, contrary to the law of nature, but it persisted in Rome down to the latest times. (Gains, 1 § 1; Inst. I, 3.)

§ 7. Modes of Becoming Slave—In General. The principal modes by which a person might become a slave were by birth and by capture in war. These modes were recognized by the *Jus Gentium.* There were also several cases peculiar to the *Jus Civile* in which persons were reduced to slavery as a punishment for wrong doing. (Inst. I, 3.)

§ 8. Same—Slavery by Birth. The children of a female slave became the slaves of her master. The status of the father as free or slave was immaterial. The general rule governing the determination of the status of a child, whether as free or slave, or as citizen or alien, was as follows: Children born in lawful wedlock had the status of the father at the moment of conception; children born out of wedlock had the status of the mother at the moment of birth. Hence if the father of a child of a lawful marriage was free at the moment of conception, the child was free although the father should subsequently lose his freedom. As to children born out of wedlock, the general rule, as above stated, was that it was the status of the mother at the moment of birth that determined the status of the child. If the mother was free at the moment of conception but a slave at the moment of birth, the child was a slave, and conversely. This was the earlier law, but the rule was modified in the interest of liberty to the effect that if the mother was free at any time between the conception and birth of the child, the child was free. (Inst. I, 4.)

§ 9. Same—Slavery by Capture. Persons captured in war became the slaves of their captors. According to the ancient view, a soldier had the right to kill his captured enemy, and the captive had no right to complain if his captor chose to preserve him alive as a slave instead of putting him to death. But the capture must have been in a war between belligerents; a forcible seizure by brigands or pirates did not result in slavery. And if a Roman citizen made a prisoner of war regained his freedom by escape or otherwise, he was considered by the fiction of *postliminium* as having never been a slave.

§ 10. Same—Special Cases of Slavery Arising under the Jus Civile. These were all cases in which a person lost his liberty as a punishment for crime or other wrong doing.

(1) A Roman citizen who, for the purpose of avoiding military service, failed to have himself enrolled on the census,

thereby lost his liberty. As the census ceased under the Empire, this case was obsolete in the time of Justinian.

(2) Under the XII Tables a thief taken in the act might be adjudged to belong to the person from whom he stole. (Gaius, 3, 189). This case was rendered obsolete by the substitution by the prætor of the penalty of fourfold restitution.

(3) By the XII Tables an insolvent debtor might be sold into slavery.

(4) By the Senatus Consultum Claudianum a free woman who had repeated intercourse with a slave might be made the slave of his master. This was abolished by Justinian (Inst. III, 12, 1).

(5) A person condemned for crime to the mines or to fight with wild beasts were regarded as slaves of punishment (*servi poenæ*), having no other master. The infliction of slavery as a punishment for crime was abolished by Justinian (Nov. 22, 8).

(6) In certain cases a freedman again became the slave of his former master for undutiful conduct to him.

(7) A freeman over twenty years of age who caused himself to be sold as a slave in order to get a share of the price by collusion with the seller, thereby became a slave. The fact that the sale of a free person was legally void afforded an opportunity to commit this fraud.

§ 11. Legal Position of Slaves. By nature a slave is, of course, a person, but by the Roman law he was a thing or chattel. He belonged to his master, whose power over him was practically unlimited. In earlier times the master might even put his slaves to death with impunity, just as he might kill his beasts. But during the Empire this power was taken away. The slave had no rights. The personality of the slave was recognized to some extent in the law of contracts and torts, but he was considered merely as the representative of his master. In religious law, however, the slave was to some

extent considered as an independent person. He might bind himself by vow or oath to the gods, and his burial place was sacred (*locus religiosus*). The condition of all slaves was the same, they were alike without rights. (Inst. I, 3, 5; I, 8, 1-2.)

§ 12. Manumission—In General. A slave obtained his freedom by manumission. The forms of manumission varied at different times. During the period of the Republic the forms of manumission were strict and ceremonial, and they had the double effect of freeing the slave and making him a Roman citizen. During the period of the Empire informal manumission was also recognized, which had the effect to free the slave, but not to make him a citizen. The two kinds of manumission, the formal and the informal, co-existed until the time of Justinian, who enacted that a slave when manumitted, whether formally or informally, should be a citizen.

The recognition of informal manumission was due largely to the prætor. Under the old law, unless the manumission was in proper form the slave remained a slave. An attempted manumission might be defeated by some technical flaw or defect. To prevent the injustice and wrong that might result from this, the prætor, in time, protected slaves imperfectly manumitted by securing to them their personal freedom. But he went no further than was necessary to satisfy good conscience, and while he protected the slave in his liberty, he secured to him no property rights. But in A. D. 19, it was provided by the *lex Junia Norbana* that all such freemen should enjoy the rights of Latin colonists, whence they were known as *Latini Juniani.*

§ 13. Formal Manumission. There were three kinds of formal manumission:

(1) *Manumissio per vindictam.* This was by a fictitious or collusive suit. The master, the slave, and a third person appeared before a magistrate (consul, prætor, proconsul, or president of a province), and the third person laid his rod

(*vindicta*) on the slave and declared him to be free; the master also touching the slave with his rod admitted the claim and turned the slave around three times and let him go (whence, *manumission*). The regular formalities of the procedure *in jure* cession were at first observed, but subsequently the formalities were dropped and all that was required was the declaration before the magistrate by the master of his intention to free the slave.

(2) *Manumissio censu.* The enrollment of the slave on the census as a citizen with the master's consent made him free. The census was held only once in five years and only at Rome, and hence this mode could not have been of much practical use. During the Empire the census was practically obsolete.

(3) *Manumissio testamento.* A slave might be set free by his master's will.

(4) *Manumissio in Ecclesia.* Constantine added a fourth mode by which the master declared in the presence of the bishop and congregation his desire to free the slave, and the slave thereby became free.

§ 14. Informal Manumission. In later times various informal modes of manumission were recognized which became effective, as already stated, through the action of the prætor and the *lex Junia Norbana.* The principal modes were by a letter in which the master gave the slave his freedom, by a declaration by the master before friends, and by permitting the slave to wear the cap of freedom at his master's funeral.

§ 15. Effect of Manumission. As already pointed out, under the early law a slave acquired by formal manumission both freedom and citizenship. An informal manumission had at first no legal effect; then, through the agency of the prætor, it made the slave personally free, but conferred no property rights; then, by the *lex Junia Norbana* (A. D. 19), an informal manumitted slave was raised to the position of a Latin Colonist; and finally, by Justinian's legislation, all manu-

mitted slaves, whether manumitted formally or informally, became both free and citizens.

A manumitted slave was called a freedman (*libertinus*). During the Republic there was but one class of freedmen—all were Roman citizens. Later two new classes were introduced, who did not enjoy the rank of citizenship. These were the *Latini Juniani,* created by the *lex Junia Norbana,* and the *Dedititii,* created by the *lex Aelia Sentia* (A. D. 4). The *Dedititii* were the lowest class of freedom, being manumitted slaves who were held subject to certain perpetual disabilities because of crimes committed by them while in slavery. These two inferior classes existed during the Empire down to the time of Justinian, who removed their disabilities, and restored the old single class of freedmen, all being Roman citizens (Inst. I, 5, 3).

But while a manumitted slave became a Roman citizen, he did not, at least during the Republic, acquire by manumission all the privileges of citizenship. In matters of private law he enjoyed the rights of a Roman citizen (the *jus commercii* and the *jus connubii*), but he did not have the public rights of a citizen. He did not enjoy capacity for office (*jus honorum*) and had only a limited right of suffrage (*jus suffragii*). (Sohm, 169, 170.)

§ 16. Restraints on Manumission. There seems to have been originally no restraint upon the power of a master to free his slaves, but by the *lex Aelia Sentia,* enacted A. D. 4, certain restraints were imposed. The objects of this law seem to have been to protect the public against the creation of undesirable citizens, to prevent fraud on creditors, and to protect the master against improvident manumissions.

§ 17. Patron and Freedman. Manumission, while it put an end to the relation of master and slave, established a new relation between the parties known as that of patron (*patronus*) and freedman (*libertus*). The former master stood to his freedman in a relation analogous to that between

father and son. He had a father's right of succession and guardianship; he was entitled to be treated with respect, and to be supported by the libertus, should he need support; and also to certain services, provided the freedman had promised them after manumission. The patron was regarded in a sense a creditor of the freedman, and the rights existed against the freedman solely, the freedman had no rights against his patron. On the death of the patron his rights devolved on his children, but the children of the libertus were freeborn (*ingenui*) and under no obligation to the patron.

The relation of patron and freedman was subject to extinguishment in various modes.

§ 18. Mancipium. There existed in early times a condition of subordination, strongly resembling slavery, known as *mancipium.* Persons sold by the ancient form mancipation were said to be *in mancipio.* Slaves were sometimes called *mancipia,* but generally the term *mancipium* was confined to the case of the free persons. Children sold by the paterfamilias did not become slaves but were held *in mancipio.* Persons *in mancipio* were said to be in the place of slaves (*loco servorum*), but the holder did not enjoy the same dominion over them as a master over his slaves. The *mancipium* resembled a pledge more than a sale.

A person *in mancipio* remained free and a citizen, though some of his rights, as *potestas,* were in abeyance. The relation of the holder and the person *in mancipio* was rather a personal relation than one of ownership as in the case of slavery. A person *in mancipio* might be released by *vindicta* (fictitious suit), by enrollment on the census (even without the consent of the holder), or by will.

The institution of mancipium was practically obsolete as early as the time of Gaius. It was then either a purely fictitious legal status employed in effecting adoption or emancipation, when, merely for form's sake, a person was momentarily reduced to this condition, or it was employed as a rem-

edy for a tort committed by a man's wife or child, the man being permitted either to make reparation himself for the wrong, or to surrender the wife or child by mancipation to the injured party (noxal surrender). This right in the case of the child was abolished by Justinian, and in the case of the wife became obsolete with the passing of marriage with *manus*.

III. The Law of Citizenship.

§ 19. Citizens and Aliens (Peregrini)—In General. A very important division of persons in Roman law was the division into citizens and aliens (*peregrini*). A citizen was one who had full legal capacity and enjoyed full legal rights in all matters of public and private law, that is, the *Jus Civile*. But from early times outsiders were drawn to Rome by trade or for other reasons, and also with the extension of Roman dominion, the Roman territory was enlarged so as to embrace many persons not Roman citizens, so that in time there were in the Roman state a large number of persons who were known as *peregrini* or aliens.

A *peregrinus* at first enjoyed no rights under the *Jus Civile*. He could not appear in his own right in a court of law, but only as represented by a Roman citizen under whose protection he placed himself, somewhat in the relation of patron and client. But while the *Jus Civile* did not apply to the *peregrini*, they were not without law. In time there grew up for them a distinct body of law known as the *Jus Gentium*, which ultimately developed, along with the *Jus Civile*, into the law of Rome. By degrees the rights of citizens were extended to aliens, and when, during the Empire, citizenship was made universal, the distinction between citizens and aliens became obsolete.

§ 20. Rights of Citizens. The Roman citizen (during the regal period called *quiris*, or member of a curia, but afterwards simply *civis*) was governed by a special law, anciently called the quiritary law, or law of the Quirites (*jus Quiritium*),

but later the *Jus Civile* or civil law. Under this law he enjoyed several distinct rights, the law relating to which made up the *Jus Civile*. The most important of these rights were (1) the *jus connubii*; (2) the *jus commercii*; (3) the *jus suffragii*; and (4) the *jus honorum*. The first two belonged to private, and the last two to public law. Citizens who enjoyed all these—for being a citizen did not necessarily include the enjoyment of all—were called *cives optimo jure*, while those who enjoyed only the private rights were *cives non optimo jure*. In early times, only the patricians were citizens in the fullest sense; the plebeians first gained the *commercium*, then the *connubium*, and, after a long struggle, the full rights of citizenship. And not all citizens of either class, patrician or plebeian, necessarily possessed all the rights of citizenship. Thus a son under paternal power did not have the *commercium*, a right enjoyed only by persons *sui juris*. And a woman might be a Roman citizen without the capacity to vote or hold office.

1. *Jus Connubii*. The *Jus Connubii* of the Roman citizen consisted in the capacity to contract a marriage with *manus*, the *justum matrimonium* or *justæ nuptiæ* of the *Jus Civile*, that is, a marriage by virtue of which the wife and the children of the marriage became members of the husband's household. Anciently only patricians enjoyed this capacity, the intermarriage of plebeians and patricians being expressly prohibited by the Twelve Tables, but in the year B. C. 445 the *lex Canulcia* conceded to the plebeians the right of intermarriage with the patricians. The children of this marriage were under the *patria potestas* of their father. This right was the basis of the Roman family law.

2. *Jus Commercii*. This was the right of making contracts, and of acquiring, holding, and transferring property of all kinds according to the *Jus Civile*. This included the property law and the law of commercial intercourse. The *jus com-*

mercii was granted to the plebeians at an early day, and was the first of the civil rights granted to them.

3. *Jus Suffragii.* This was the right of voting in the popular assemblies.

4. *Jus Honorum.* This was the right of eligibility to all public offices, civil, military and sacred.

IV. The Law of Family.

§ 21. In General. The family law of the Romans was a highly developed and most important branch of their law. The legal status of a person was determined, as we have seen, in part by his family relations. In general, the legal effect of the rules governing the family relations was to subordinate one person to the authority, often to the arbitrary authority, of another, the head of the family. This subordination extended not only to the persons of those who were subject to the family power, but also to their property.

Family law is divided into three parts, corresponding to three forms of family power: (1) The Law of Marriage, governing the relation of husband and wife. This has to do with the marital power; (2) The Law of Patria Potestas, or the paternal power, governing the relation of parent and child (*paterfamilias* and *filiusfamilias*); (3) The Law of Guardianship, or the tutorial power, governing the relation of guardian and ward.

§ 22. Principles of Relationship—In General. The Roman conception of a family was not always the same. According to the *Jus Civile* the constitution of a family was determined by a peculiar principle of relationship known as *agnation*; in the final stage of Roman law it was determined by a wholly different principle known as *cognation.* We shall consider first the earlier form, or the agnatic family of the *Jus Civile.*

§ 23. The Agnatic Family. The agnatic family was the aggregate of those who are bound together by a common paternal power. Members of the same family were called agnates. Agnates were all those who were subject to the same paternal power, or who would be subject thereto, if the common ancestor or *paterfamilias* were alive. Agnates might be related to each other by blood, but this was not necessarily the case. They need not be so related, nor were all blood relatives agnates. The agnatic relation was created by any one of the modes by which one may become a member of the agnatic family. These modes are: (1) Birth; (2) Adoption; (3) Marriage.

All legitimate children of a Roman marriage (with *manus*) became by birth members of their father's agnatic family. So also all legitimate descendants, grandchildren, etc., through the *males* were likewise agnates. But the children or other descendants of *daughters,* married with *manus,* were not members of the same agnatic family to which their mother, or grandmother, etc., belonged. The reason for this was that a daughter lost by marriage her membership in her father's family and became a member of her husband's family. She and her children were not agnates of her father, brothers, etc., but of her husband, and his agnates. By marriage she had passed from the paternal power of her father (or of his father or grandfather, as the case might be) into the power of her husband (or his father, etc.).

A mother was not, as mother, the agnate of her own children. If married was *manus* she was under the power of her husband, just as her children were, and she was regarded as in the legal position of daughter to her husband, and hence as agnatic *sister* of her own children. If married without *manus* she was still an agnate of her father's family, and had no agnatic connection with the family of her husband. She was, therefore, not related—i. e., by agnation—to her own children. Under the free marriage the mother and her children did not belong to the same family.

The acquisition of the agnatic status by adoption will be more fully considered later. As just pointed out, a woman became by marriage an agnate of her husband's family and ceased to be an agnate of her father's family. The marriage of a man did not affect his agnatic status.

A person might cease to be an agnate of the family to which he or she belonged by (1) Death; (2) Marriage (in case of a woman); (3) Adoption into another family; or (4) Emancipation.

From the description of the agnatic family just given it will be seen that practically all persons bearing the family name were members of the agnatic family. Thus, to employ an illustration suggested by Professor Hadley, take the family of Governor Winthrop of Massachusetts. All of his children upon their birth are named Winthrop. They are agnates of their father and of each other. But if a daughter marries into a family of a different name, she is no longer a Winthrop. And she has ceased to be an agnate of the Winthrop family, but belongs to her husband's family. So also of her children. But a son, though he marries, is still a Winthrop and an agnate of that family. And his children also are Winthrops and Winthrop agnates, except daughters who marry into other families. The wife of the Governor became a Winthrop by her marriage to the Governor. She thereby became his agnate, and so of the wives of the sons of the Governor and their sons, etc. Again, suppose the Governor had adopted a child (which he could have done by the Roman law, though not by the common law) and given him the Winthrop name, such child, whether male or female, would thereby become a Winthrop agnate. The illustration does not hold in the case of an emancipated child. Such a child still bears the family name, but he is no longer an agnate of his former family.

The agnatic family as above described was partly a natural and partly an artificial institution, that is, membership in the family might have a natural foundation—relationship on the father's side, or be artificially established by marriage or

adoption. So, also, agnatic relationship might be artificially extinguished, as by marriage or adoption into another family or by emancipation.

§ 24. The Cognatic Family. The conception of a family according to the *Jus Gentium* was very different. The principle of relationship upon which the family of the *Jus Gentium* was founded was cognation or consanguinity. The cognatic family was the aggregate of those who were related to each other by blood. Membership in the cognatic family could arise only by birth and be extinguished only by death. It was a purely natural relationship. In the earlier Roman Law the principle of cognation was not recognized, family relationship depending upon agnation alone, but later, especially through the agency of the prætor, cognation grew more and more into favor, until finally the principle of cognation altogether superseded agnation, and the earlier conception of the agnatic family was displaced by the cognatic family of the *Jus Gentium*. This development is especially noticeable in the law of inheritance. The final adoption of the principle of cognation was due to Justinian, whose latest reforms on the subject were subsequent to his original codification of the law, being embodied in the Novels.

1. The Law of Marriage—Husband and Wife.

§ 25. Definition of Marriage. According to Modestinus, "Marriage is a union of a male and a female, an association throughout life, a union of all their rights, both divine and human." (Dig. 23, 2, 1.) According to the Institutes, "Marriage or matrimony is the union of a man and a woman, involving the habitual intercourse of daily life." (Inst. I, 9, 1), and "Roman citizens are joined together in lawful wedlock when they are united according to law." (Inst. I, 10, pr.)

§ 26. Capacity to Marry—Absolute Disqualification. Certain persons were absolutely disqualified by the Roman law to marry. They were:

(1) Slaves. These could not marry, but they could enter into a union known as *contubernium,* which was practically the same as marriage, though without legal force.

(2) Persons under the age of puberty (fourteen years for males and twelve for females). But if a girl married under age remained with her husband until she became of age (twelve), she became his legal wife.

(3) Persons already married. Polygamy was never lawful among the Romans. But a person whose husband or wife had been five years in captivity could marry again without dissolving the first marriage.

(4) A woman prosecuted for adultery could not marry unless she was acquitted or the prosecution was abandoned. If convicted she could not marry.

(5) A female slave manumitted by her master for the purpose of marrying him, could not marry anyone but him, unless he gave her up. If she refused him, she could not marry another, even with his consent.

§ 27. Same—Relative Disqualification. The following are the principal cases of persons who, though having general capacity to marry, could not intermarry.

(1) *Persons related within prohibited degrees.* Relationship in Roman law, it will be remembered, might be either agnatic or cognatic; agnation being the artificial tie through the potestas, and cognation the natural tie through birth.

(a) Ascendants and descendants, in any degree, could not intermarry, whether the relationship was agnatic or cognatic, and even though the artificial tie of agnation was broken by emancipation.

(b) Collaterals within the third degree could not inter-

marry, but collaterals beyond the third degree (with some exceptions) could intermarry. For a time, under the old law, the prohibition extended to the fourth degree, thus preventing the marriage of first cousins. In the case of agnates, if the tie be broken by emancipation, the restriction was removed.

(c) Relatives by affinity (*affines*), which includes persons connected by marriage, concubinage, or contubernium. There were no regular degrees of affinity, but certain enumerated *affines* were prohibited from intermarrying. Thus a man could not marry his mother-in-law, daughter-in-law, step-mother or step-daughter. Nor under the legislation of Constantine (the first Christian emperor) and some of his successors, could a man marry his brother's widow, or deceased wife's sister. The intermarriage of a woman with her ~~sister's widower, or~~ deceased husband's brother does not seem to have been prohibited.

(2) *Persons in Fiduciary Relation.* Tutors and curators or their sons could not marry their wards (pupillæ) until they were twenty-six years of age. The object of this prohibition was to remove the temptation to marry the ward in order to cover maladministration, and the prohibition was continued for the period within which the woman could challenge the accounts.

(3) *Patron and Freedman.* A patron might marry his freedwoman (*liberta*), but it was considered more becoming (*honestius*) for him to take her as concubine. A female patron would not marry her freedman (libertus), nor could a freedman marry the wife, daughter or granddaughter of his patron.

(4) *Citizens and Aliens.* Roman citizens could not marry Latius or Peregrini. (The intermarriage of patricians and plebeians was prohibited for a short time by the Twelve Tables, but the prohibition was removed in B. C. 445 by the

Lex Canuleia passed at the instance of the (plebeian) tribune C. Canuleius).

(5) *Christians and Jews* could not intermarry. This prohibition was introduced in A. D. 388 under the Christian Empire.

(6) *Criminals.* A man convicted of adultery with a married woman could not marry her. And a man who had committed rape could not marry his victim, the reason being that the property of the rapist was forfeited to the woman, and by marrying her he could get it back.

§ 28. The Agreement to Marry (Betrothal). Anciently in Rome betrothals were made by the form of contract known as *stipulation,* but in later times the reciprocal promises of the man (*sponsus*) and the woman (*sponsa*) and of those, if any, under whose power (*potestas*) they were, were sufficient without any further ceremony, and without writing or witnesses. The consent of the betrothed and of the paterfamilias of each, if under power, and of the tutor and mother of one that was *sui juris,* was necessary. In Latium an action for damages (*actio ex sponsu*) might be maintained for breach of promise to marry, but in Rome there seems to have been no such action. However, there was a custom in Rome to exchange presents (*arrhæ*) at the time of the betrothal as earnest, such presents to be returned if the engagement was broken for good reason, or forfeited to the innocent party if broken without good reason. (Hunter, 695-696.)

§ 29. The Two Kinds of Marriage—In General. As early as the Twelve Tables there were two forms of marriage: marriage with *manus* and marriage without *manus.* The former was known as a "strict" marriage (*justæ nuptiæ*). It was an institution of the *Jus Civile,* and could be contracted in any one of several modes to be presently described. This form of marriage was open only to Roman

citizens. The other form of marriage, which was known as a "free" marriage, was an institution of the *Jus Gentium,* and was therefore open to citizens and non-citizens alike. It was contracted in an informal manner.

§ 30. Marriage with Manus—Strict Marriage (Justæ Nuptiæ). In a strict sense, marriage with *manus* was originally the only type of marriage to receive full recognition in Roman law, the free marriage not being attended with all the legal consequences of marriage with *manus.* In time, however, as we shall see, in Roman law, as in English law, some of the most striking consequences of marriage become obsolete, and finally the strict form of marriage disappeared and was superseded by the free marriage and the doctrine of *manus* became obsolete.

§ 31. Same—Modes of Contracting Marriage with Manus. There were three modes of contracting marriage with *manus*:

(1) *Confarreatio.* This was a religious rite the precise form of which has not come down to us. It consisted essentially in the sacrifice of wheaten bread (*farreus panis*) to Jupiter. (Compare the modern wedding cake.) The ceremony took place before the Pontifex Maximus and the priest of Jupiter. Only patricians could marry by this mode, and only persons born of this kind of marriage were eligible to the priestly office. (Gaius, I, § 112.)

(2) *Coemptio.* This was a purchase of the wife by the husband from the person in whose power she was. The transaction was by the ceremony of mancipation, in the presence of the balance-holder and five witnesses. Coemptio was the ordinary form in which any Roman citizen, whether patrician or plebeian, might marry. (Gaius, I, § 113.)

(3) *Usus.* Where a man and a woman not married by either of the above modes cohabited as husband and wife for a period of one year, their marriage, previously resting upon

mere consent (free marriage), ripened into the strict marriage by prescription and the wife passed *in manum.* But the Twelve Tables provided that the wife might avoid this result by absenting herself for three consecutive (Roby, 69) nights in each year, thus interrupting the *usus* for that year. (Gaius, I, § 111.)

§ 32. Same—Effects of Marriage with Manus. By the strict marriage the wife passed into the marital power of her husband (*in manum viri*). The *manus* or marital power may be regarded as a particular form of the *patria potestas.* An *uxor in manu* was a member of her husband's household. Although called a *materfamilias,* this term did not have a meaning corresponding to the term *paterfamilias.* The wife was not the head of the family. She stood legally in the position of a daughter (*in loco filiæfamilias*) of her husband. If she had children she was regarded as a sister of her own children. The relation of husband and wife, both as regards the wife's person and her property, was governed by the same rules of law as governed the relation of father and child. The law of husband and wife may, therefore, be considered as merely a particular branch of the law of parent and child.

The husband had, in general, the same power over the person of his wife *in manu* as the father had over his child. Anciently, it may be supposed, the husband had power to chastise his wife, and even to kill her, as he had to chastise or kill his child. But this extreme power to kill the wife does not appear to have existed within historic times. The right of punishment seems to have survived, but in serious cases the husband was required by custom and tradition, though, it seems, not by law, to consult a council composed of the wife's relatives. Probably the husband at first had the power to sell his wife, just as, in marriage by *coemptio,* he bought her, but it is said that no cases of actual sale have come down to us. But a fictitious sale (*mancipatio*) was a recognized mode of emancipating the wife from the *manus*

of her husband. It thus appears that, while originally the husband probably had precisely the same powers over the person of his wife as the father had over the person of his child, the rigor of the law was softened at an earlier date and more completely in the case of the wife than of the child.

As regards the wife's property, her position was exactly the same as that of a child in power. Whatever she had at the time of her marriage passed by law to her husband. And whatever she afterwards acquired by gift, inheritance, or otherwise, belonged to him. She could not acquire or own property by herself, but only for him. She could, however, like slaves and children, enjoy the limited form of ownership known as *peculium*. The wife's antenuptial debts *ex contractu* were extinguished by the marriage. This rule, however, was modified by the prætor, who permitted the wife's creditors to subject such property of the wife as came to the husband by the marriage to the payment of their claims in case the husband refused to pay them. Thus it may be said that the husband, by the prætorian law, was liable for his wife's antenuptial debts *ex contractu* to the extent of her antenuptial property acquired by him by the marriage. As the wife, like the child, had no contractual capacity, neither the wife nor the husband could be held liable for the wife's postnuptial contracts, except that the husband could be held liable on his wife's contracts in those special cases in which by the prætorian law a father was liable for the contracts of his child.

The husband was liable for his wife's torts just as a father is liable for the torts of his child. And if the husband was unwilling to pay the damages or the penalty, he might surrender the wife into the *mancipium* of the party injured, the wife being thereby placed in the position of a slave.

As a sort of compensation for the loss of her individual proprietary rights by her marriage, the wife *in manu* was given exactly the same rights of succession on her husband's

death as though she had been his daughter. The wife also took the social rank of her husband. And the husband was at least morally bound to support his wife, though this was probably not his legal duty, unless the wife had a dowry, in which case the husband would be compelled to support her out of it.

§ 33. Marriage without Manus—Free Marriage. Marriage without *manus*, the marriage of the *Jus Gentium*, was recognized as early as the Twelve Tables. Anciently, it seems, this form of marriage was not considered a true marriage. The wife remained a member of her own family, under the power of her *paterfamilias*, or the guardianship of her relatives, as the case might be, and the children of the marriage followed the condition of their mother. They were not legally related to their father, and did not pass into his *potestas* nor become members of his family. In time, however, during the period of the Republic, marriage without *manus* came to be recognized as a true marriage and ranked with a *justum matrimonium*, or marriage valid by the *Jus Civile*. The legal effect of such a marriage was, indeed, not the same as that of a marriage with *manus*, but the marriage was recognized as a legal marriage. And in time—during the Empire—the marriage without *manus* superseded marriages with *manus*, and the old forms of marriage disappeared. Coemption and confarreation were no longer known and usus lost its effect so that the *trinoctium* was not required to prevent a free marriage from ripening into a marriage with *manus*.

§ 34. Same—Modes of Contracting Free Marriage. The free marriage, or marriage without *manus*, was not required to be celebrated in any particular mode. Any declaration of consent, followed by the delivery of the wife to the husband or to his house (*ductio in domum mariti*) was sufficient, and whether such delivery was necessary is disputed. It appears that a man could by letter or message enter into

a marriage although absent, provided the woman was taken to his house; but the woman could not in her absence be married to a man (*vir absens uxorem ducere protest, femina absens nubere non potest*). It is to be supposed that cases of marriage where both parties were not present, or not followed by immediate cohabitation, were rare. Doubtless, too, most marriages were accompanied by various festivities and social observances, which, though without legal significance, tended most clearly to show matrimonial intent.

So far as the legal requirements of form were concerned, or rather the absence of such requirements, the free marriage did not differ from concubinage. Both were founded upon consent and both were accompanied by cohabitation. But marriage resulted from (matrimonial) consent, not from cohabitation (*nuptias non concubitus, sed censensus facit.* Dig. XXXV, 1, 15) and it was the intent of the parties that distinguished the one relation from the other. The taking of a wife differed from the taking of a concubine only in the intent. Where the actual appearances were the same, therefore, the status of the parties could be determined only by the aid of presumptions—marriage being presumed where the parties were of the same rank, and concubinage where they were of different rank. But by a constitution of Emperor Justin the presumption was always in favor of marriage.

§ 35. Same—Effects of Free Marriage. The position of the wife under the free marriage was entirely different from that of the wife *in manu*. Instead of being practically the chattel or slave of her husband she was his equal, and the marriage was essentially a partnership. No doubt the *actual* position of the wife *in manu* assigned to her by social custom was far higher and easier than her legal position, as was the case of the English wife in the time of the English common law, but under the free marriage she was legally as well as actually substantially her husband's equal. The wife did not by the marriage become a member of her hus-

band's household nor become subject to his paternal power. She remained a member of her father's family. If *sui juris* before marriage, she remained so, and if under her father's power, she likewise so remained, except that the *patria potestas* had to give way where it conflicted with such marital power as accompanied even the free marriage. This marital power consisted in the husband's right to companionship of his wife, and the right to decide all questions of domestic policy. He had the right to determine the matrimonial domicile, and the wife's legal domicile was that of her husband. He had also the right to determine the nature and extent of the household expenditure and also the education of the children. The husband even under the free marriage was the head of the family and the wife occupied a position of subordination, but a very different kind of subordination from that of the children or of the wife *in manu*.

The free marriage did not affect the property rights, personal liabilities, nor contractual capacity of the wife. Her antenuptial rights and liabilities remained solely hers after the marriage. Whatever she owned at the time of the marriage, or acquired afterwards in any manner, was her separate property. Her capacity for acquiring and holding property and for incurring liabilities was unaffected by the marriage. The husband might manage her property as her agent, but otherwise had no sort of legal control over or right to it. In the free marriage the property of both husband and wife remained unaffected by the marriage both during their joint lives and also after the death of either of them. There was not even the right of mutual succession except, in later times, to a very limited extent.

There were three respects in which the property and personal relations of husband and wife were affected by the free marriage: (1) the husband was bound to defray all household expenses, including the support of the wife. This rule was substantially affected by the custom of giving a *dos*.

(2) Mutual gifts between husband and wife were void, and property given by either spouse to the other might be recovered back any time by the donor, but if the donor died without exercising this right, the surviving donee might retain the property. (3) Husband and wife could not sue each other for theft. But if either spouse committed a theft in view of a divorce, the other party might recover compensation in a special action granted by the prætor.

§ 36. Same—Position of Children of Free Marriage. The children of a free marriage were members of the father's household and under his paternal power. They belonged to his agnatic family. The mother and her children were not of the same family and no legal rights or duties existed on either side. But in later times by the *senatus consulta Tertullianum* (A. D. 158) and *Orphitianum* (A. D. 178) the right of succession of mothers to their children and of children to their mothers, respectively, was created.

§ 37. Gifts between Husband and Wife—Dos. As a contribution on the part of the wife towards the expenses of the joint household, it was customary to make over to the husband some property known as the *dos*, or dowry. The custom of giving *dos*, though well established before the close of the Republic, seems to have grown up after the Twelve Tables. The *dos* may have been a sort of compensation to the husband for his failure to receive the wife's property by the marriage after the decline of the *manus*. The property might be given by the wife's father, or other male ascendant, in fulfillment of a legal duty on his part to provide it (*dos profectitia*), for a daughter or granddaughter had a legal right to require her father or grandfather, as the case might be, to provide a *dos* as a last act of maintainance; or it might be given by any other person, as by the wife herself, or by anyone else other than her father or other male ascendant (*dos adventitia*). The *dos* might be actually given to

the husband or merely promised, such promise being enforceable.

The husband was not the absolute owner of the dotal property; he was rather practically a trustee, having the right to the use and income or produce of the property, but being bound to restore the corpus thereof upon the dissolution of the marriage. If the property consisted of *res fungibles*, such as money, food, etc., which were consumed in the use, he was obliged to restore them in kind.

Before Justinian the husband was allowed in certain cases to retain the dotal property in case he survived his wife, but Justinian enacted that in all cases the *dos* should go to the heirs of the wife, unless the person giving it had specially stipulated that it should revert to him or his heirs.

The husband's right to the dotal property was at first more extensive than here stated, but by successive stages his ownership was reduced so that practically all that remained to him was the usufruct and control of the property during the coverture.

§ 38. Same—Donatio Propter Nuptias. As a rule, mutual gifts between husband and wife were void. But gifts made before marriage by a man to his betrothed was valid. Such a gift was called a *donatio ante nuptias*. This term, however, in time acquired a special technical sense and denoted a gift made before marriage by the prospective husband, or by some one on his behalf, to the future wife for her support, it being deemed important that married women should have property of their own, so that they might not be unprovided for in the event of the dissolution of the marriage.

The object of the *donatio ante nuptias* was to make such provision. Originally the donation had to be made before marriage, but by Justinian's legislation it might be made after marriage, and its name was changed to *donatio propter nuptias*. Upon the dissolution of the marriage, both *dos* and *donatio propter nuptias* belonged to the wife, the former be-

ing the property derived from her own side and the latter that derived from her husband's side. It was common for the gift by the husband to be returned to him in the shape of *dos*. And sometimes, also, the *donatio* was not actually paid but merely covenanted for at the time of the marriage, and could be recovered by the wife upon its dissolution. The property given as *dos* and *donatio propter nuptias* belonged to the wife alone and the children of the marriage had no interest therein.

§ 39. **Dissolution of Marriage—In General.** A marriage was, of course, dissolved by the death of either party. It was also dissolved by either party's falling into a condition analogous to that of the civil death of the English law, as by being reduced to captivity (in which case the doctrine of *postliminium* did not apply) or slavery by any other mode; or by loss of citizenship (if the other party wished to give up the marriage). Again, it might be dissolved by a change in family relationship, as where a father-in-law adopts his son-in-law (by marriage, without *manus*) so that he becomes the adoptive brother of his wife. This result might be avoided, however, by the father's first emancipating his daughter. A marriage could also be dissolved by the *paterfamilias* of the wife, where being married without *manus*, she remained under her father's *potestas*. Under the old law, the *paterfamilias* could take his daughter from her husband regardless of their wishes, but under the legislation of the Empire a father could not disturb a harmonious union unless for very weighty reasons.

§ 40. **Same—Diffarreation.** A marriage by *confarreatio* could be dissolved only by means of a corresponding contrary ceremony known as *diffarreatio*. This ceremony was a counter sacrifice offered to Jupiter, the god of marriage, and required the co-operation of the pontiff, who might decline to permit the dissolution of the marriage unless there was some ground therefor deemed sufficient under the *jus*

sacrum. It is said that the pontiff took care that *diffarreatio* should be infrequent and costly, and that the sacrifice was accompanied by certain abominable rites. The necessity for the intervention of the pontiff protected the wife married by *confarreatio* from arbitrary divorce by the husband. The marriage of a priest (*flamen dialis*), which was required to be celebrated by *confarreatio*, could not be dissolved.

§ 41. Same—Remancipation. Marriage by *coemptio* and *usus* were dissolved by *remancipatio*, which was a fictitious sale into *mancipium*, or bondage, followed by manumission by the fictitious vendee. The remancipation of a wife corresponded exactly with the emancipation of a daughter. The husband's power to divorce his wife by this mode was absolute. He could divorce her at will, either with or without cause. Her consent was not required. Under the old law, she could neither procure nor prevent this form of divorce, but in later times she could require her husband to take the necessary steps to dissolve the marriage.

§ 42. Same—Dissolution of Free Marriage. The free marriage, being founded upon mere consent, without formal celebration, might be dissolved by an informal withdrawal of consent. The dissolution of the marriage (*divortium*) might be effected by the mutual consent of both parties, or by the will of one party alone. And the wife had the same power to dissolve marriage as the husband. All that was necessary to dissolve the marriage was the intent, which, however, was required to be expressed in the form of a notification (*repudium*) by one spouse to the other. (Sohm, 476n.) By the earlier law no particular mode of notification was required. It might be oral or written, and given personally or by messenger or letter. Thus a husband might divorce his wife by simply telling her that the marriage was at an end. Or he might take the keys from the wife, put her out of his house, give her back her dowry, and the marriage was dissolved. Cicero divorced his wife Terentia by letter.

By the *lex Julia de Adulteriis* (B. C. 18) a written bill of divorce (*libellus repudii*) was required to be given in the presence of seven witnesses, Roman citizens above the age of puberty. The bill should properly be delivered to the other party, but this was not essential. It was possible for one spouse to divorce the other without the latter's knowledge. The bill of divorce was publicly registered.

The rules of divorce applicable to free marriages were in time extended to marriages with *manus*. The wife, in *manu*, could not, indeed, directly divorce her husband, but by her *repudium* she could require him to procure a formal divorce.

§ 43. Restraints on Divorce. Divorces were very unusual during the Republican period, though practically unrestrained by law. It is said that for five hundred years no one divorced his wife. But under the Empire divorces became extremely frequent, and several laws were enacted placing restraints upon the right of divorce. These laws prohibited divorces except for certain causes, and provided that persons divorcing their spouses without statutory grounds should suffer certain penalties. Thus a wife illegally divorcing her husband forfeited her *dos*, and a husband putting away his wife without statutory cause was required to pay her the *donatio propter nuptias* which he had merely agreed to pay. Indeed, the primary purpose of the donation (which was an institution of the later Empire) was to secure to a wife divorced without good cause a contribution of property from her husband.

It should be noted that these laws merely prescribed certain penalties for dissolving marriages without any statutory ground. They did not declare divorces without such ground void. A husband or wife was just as free to divorce his or her consort without cause as before. The only effect of the legislation was to require a person dissolving a marriage without statutory ground to pay a penalty for the privilege.

§ 44. Augustan Marriage Laws. The Emperor Augustus sought by a comprehensive series of marriage laws (*lex Julia de maritandis ordinibus* (A. D. 4?) and *lex Papia Poppæa* (A. D. 9), to promote marriages and encourage the bearing of children. Persons remaining unmarried (*cælibres*) without sufficient reason and childless persons (*orbi*) were made incapable of taking property by will. These penalties were abolished by later emperors. (Sohm, § 99.)

§ 45. Second Marriages. A widow was forbidden to marry again until one year after her husband's death. If she married before the expiration of her year of mourning, the marriage was valid, but she suffered infamy and lost some of her rights of succession. A divorced woman might remarry after six months after the divorce, but later the time was extended to one year. In the case of the remarriage of either parent the rights of the children of the first marriage in the property of their deceased parent acquired by the remarrying parent were protected by legislation of the later Empire. (Sohm, § 98.)

§ 46. Concubinage. During the Empire, there existed a legally recognized quasi-matrimonial institution known as *concubinatus,* which was, as it were, an inferior sort of marriage. Like a true marriage, it was a monogamous relation; polygamy was never recognized in Roman law. A man could not have two wives, or two concubines, or a wife and a concubine, at the same time. Like a marriage, also, it was terminable at the pleasure of either party. Persons forbidden by the law of nature to intermarry could not live in concubinage, but persons whose intermarriage was forbidden only by the *Jus Civile* might do so.

While the position of the concubine (*concubina*) was legally recognized, it was inferior to that of the wife. She was not called *uxor,* and did not share the rank and position of the man. The offspring of this union (*liberi naturales*) were not under the *patria potestas* of their father. But under

the legislation of the Christian Emperors they could be legitimated, i. e., brought under the *potestas* of their father by the subsequent intermarriage of their parents. (Note that legitimation of bastards under modern statutes is effected by the intermarriage of their parents whose relations had previously been illicit. The legitimation of the Roman law extended only to the case of the children of concubinage, a lawful relation).

§ 47. Contubernium. Slaves could not marry, but they might enter into the relation of *contubernium*, which was practically a marriage, though not legally recognized as such. The children of such a union were regarded as cognates and could not intermarry if they afterwards became free.

2. The Law of Parent and Child.

§ 48. Paterfamilias and Filiusfamilias—In General. Every Roman citizen was either a *paterfamilias* or a *filiusfamilias*, that is, he was either independent or free from paternal power (*homo sui juris*), or dependent or subject to paternal power (*homo alieni juris*). The term *paterfamilias* does not necessarily mean the actual father or head of a family. It was simply the generic name for an independent person. The *paterfamilias* might be either a child or an adult, either married or unmarried. A female, however, could never occupy the position of *paterfamilias*, for she was never legally independent, at least under the old law. Corresponding to the term *paterfamilias* was *filiusfamilias*, or *filiafamilias*, which was the generic name for any person under paternal power whether son or daughter, grandson or granddaughter, etc.

The distinction between *paterfamilias* and *filiusfamilias* belongs entirely to private law. It was not observed in public law. A *filiusfamilias*, if otherwise qualified, was as capable of voting or holding office as a *paterfamilias*.

§ 49. The Paternal Power (Patria Potestas)—In General. The *patria potestas*, or paternal power, was the

sum of the rights and powers enjoyed by the head of a Roman family over the members of his household. In the extent to which it went the *patria potestas* was one of the most remarkable features of the Roman law. It was the basis of the Roman family, and was an institution of the *Jus Civile.*

The *potestas* could be enjoyed only by a Roman citizen, and a loss of citizenship involved also the loss of the *potestas.* Moreover, it was enjoyed only by the male head of the family, the father, grandfather, etc., and never by the mother, grandmother, etc. A mother could never exercise the power for she was herself either under the *manus* of her husband, or under the power of her father in case of a free marriage, or, if a widow, under the tutelage of her own children or other agnates. A married woman was, indeed, known as a *materfamilias,* where the marriage was with *manus,* in which case, since she was under the marital power of her husband, the term *materfamilias* was the equivalent of *filiafamilias* rather than *paterfamilias.* In later times the term *materfamilias* was applied to any woman of good character whether married or not.

§ 50. Paternal Power as to Person of Child. Anciently the *patria potestas* included practically an absolute and arbitrary power of the *paterfamilias* over those subject to his power. His children and other agnatic descendants were practically in the position of his domestic animals. He had the power of life and death (*jus vitæ ac necis*) and of selling into slavery. Actually his power was somewhat checked by the custom which required him to appeal to a family council in serious cases.

The power of life and death and of selling into bondage was expressly recognized by the Twelve Tables. It was provided that "the father shall, during his whole life, have absolute power over his legitimate children. He may imprison the son, or scourge him, or keep him working in the fields in fetters, or put him to death, even if the son held the

highest offices of state, and was celebrated for his public services. He may also sell the son. But if the father sell the son the third time, the son shall be free from his father." The *paterfamilias* enjoyed this supreme power of life and death and of sale, no doubt, as a part of his general right of property. His children belonged to him, as did his cattle or his oxen, and he could do as he pleased with his own property. But there is another and a loftier notion which may have, in part at least, supported this rule of extreme paternal authority. The head of the patriarchal household bore not only the character of proprietor, but also of ruler. He was a domestic judge, and his act in inflicting upon a disobedient son extreme punishment was probably regarded as the judgment of a magistrate rather than an arbitrary exercise of the right of ownership.

The right of a father to kill his offspring existed even down to the period of the Empire, and it is stated that infanticide was a common practice even in later times. A very early law, indeed, ascribed to Romulus, prohibited parents to expose any male children or their first born female children unless such children, in the opinion of five neighbors, were so deformed that they ought to be killed. The practice of infanticide was not prohibited until the year 374 A. D., when it was enacted that the exposure of infant children was a crime. The killing of older children, however, received various checks during the Empire. The Emperor Trajan compelled a father who had been grossly cruel to his son to emancipate him and forfeit all share in his inheritance. And in the time of Hadrian a father who killed his son while hunting was punished by deportation to an island, and this although the son had committed adultery with his stepmother. Finally the Emperor Constantine (the first Christian emperor) enacted that if a paterfamilias slew his son, he should suffer the death of a parricide, that is, be tied up in a sack with a cock, a viper, and an ape, and be thrown into the sea or a river to be drowned.

§ 51. Same—Sale of Child. The sale of children by their fathers is supposed to have been once of frequent occurrence. A child so sold did not become a slave, but passed into that condition of subordination known as *mancipium*, from which he could be released by enrollment on the census, even without the consent of his master. A son so released from *mancipium* passed back under the *potestas* of his father. A son might thus have been indefinitely sold by his father but for the restriction of the Twelve Tables that a son sold three times should be free from the father. The fact that this restriction was enacted seems to indicate that repeated sales of children were common.

The practice of selling children became obsolete at an early date, and in later times only the form of a fictitious sale three times was employed as a mode of emancipation. A father whose child had committed a tort was permitted to surrender the child by mancipation to the injured party (noxal surrender), but even this right was abolished by Justinian.

§ 52. Paternal Power as to Property of Child. As respects property the position of a *filiusfamilias* was originally precisely the same as that of a slave. He could not acquire or own anything for himself. Whatever he acquired by any mode belonged to his *paterfamilias*. "A *filiusfamilias*, in the time of Cicero, even had he filled every office up to the consulate, or had, like Cincinnatus, twice saved the state, was not capable of, in the true sense of the word, *owning* the smallest coin current in Rome" (Hunter, 292). And it is a striking fact that although married women were practically completely emancipated during the period of the Empire, a son under power, even though he might attain the highest dignities of state, remained in a position of dependence and subordination to the paternal power, to the last days of Roman history.

This, however, was peculiarly true of the personal status of the *filiusfamilias*. In time he was accorded property rights

of a more or less substantial character. During the Republic the only concession was to allow him to enjoy *peculium,* on the same terms as a slave (Dig. 15, I, 1, 5). In the time of the early Empire, a son was permitted to own and enjoy all property coming to him from any source, even from his father, by reason of his being a soldier. This property was called *peculium castrense.* Later the privilege was extended to include property acquired by the higher public officers as such. This was called *peculium quasi-castrense.* Finally, by successive enactments, the father's right to property acquired by his son from any one else than the father, as from the mother by testament or on her death intestate, was cut down to the mere usufruct or right to enjoy and manage the property during his life, the son being regarded as the owner. This property was called *bona adventitia.* Thus in the time of Justinian, the only proprietary incapacity of a *filiusfamilias* was his incapacity to acquire property from his own father (*ex re patris*). He was the absolute owner of the *peculium castrense* and the *peculium quasi-castrense,* and the owner of the naked legal title of the *bona adventitia;* the usufruct belonging to the *paterfamilias.* Property received from the father by way of *peculium* (called *peculium profectitium,* this being the early type of *peculium*), remained the property of the father.

§ 53. **Adoption—In General.** The subject of adoption occupied an important position in Roman law, adoptions being very common among the Romans. Originally the object of adoption seems to have been to prevent the extinction of a family by the death of the *paterfamilias* without heirs. The Romans attached much importance to the perpetuation of one's legal personality. This was accomplished in the case of one dying leaving children by the succession of his children to his personality as his heirs. And anciently the chief function of the heir was not to succeed to the property of the deceased but to continue his legal personality. But if the head

of the family left no descendant, his family and its sacred rights (*sacra privata*) were extinguished with him. To prevent this calamity, the device of adoption was resorted to, by which, by a fictitious relationship, an heir was obtained to a man without natural descendants. And in keeping with the purpose of the adoption, only men without hope of children of their own could adopt, which excluded all persons but married men without descendants or the hope of any. Historically the practice of adoption seems to have antedated that of making wills, both having originally the same object, the determination of the devolution of the inheritance in the absence of natural heirs by supplying an heir.

Women were incapable of adopting, but during the later Empire (time of Diocletian) women whose children had died were allowed to adopt by rescript of the Emperor, the only effect of the adoption being to create mutual rights of intestate succession between the adoptive mother and the adopted child and his descendants.

§ 54. The Two Kinds of Adoption—Arrogation—Adoption. There were two kinds of adoption: (1) The adoption of a person *sui juris,* which resulted in bringing under the *potestas* of the adopter a person previously not under power. This was called arrogation. This was the older form, and originally only persons *sui juris* could be adopted. (2) The adoption of a person *alieni juris,* which resulted simply in the transfer of the person adopted from one *potestas* to another. This was called simply *adoption.*

§ 55. Modes of Arrogation. There were two forms of arrogation, both public in character. (a) The ancient form, which required a preliminary investigation by the pontiffs and a decree of the *comitia curiata.* The adoption of a person *sui juris* (himself, if a male, a *paterfamilias*) involved the extinction of a paternal power, which was regarded as a matter of public concern. Hence the public character of the act by which the adoption was effected. And no one could

be arrogated who was not eligible to membership in the comitia, and so able to give his consent in the curiata. Hence, no woman, peregrinus, slave or (originally) person under puberty could be arrogated. The arrogator must be married and over sixty years of age, unless because of ill health or other reason he would probably die childless. And since the object of arrogation was simply to supply an heir, only a man without legitimate child could arrogate, and he could not arrogate more than one person. This mode of arrogation continued in use down to the time of the early Empire, and was employed by Augustus in the adoption of Agrippa and Tiberius. It is the only form mentioned by Gaius or Ulpian. (b) In later times arrogation was by rescript of the Emperor.

§ 56. **Modes of Adoption.** As in the case of arrogation, there was an earlier ceremonial form of adoption which was superseded in later times by an informal mode. Unlike arrogation, however, adoption could be effected by private act. To effect an adoption required two distinct steps: first, the extinction of the former *patria potestas*, which was accomplished by the ceremony of emancipation (by the father selling his son three times into bondage), and, second, the establishment of the new *patria potestas*, which was accomplished by a fictitious suit in which the adopter claimed the son as his. In the case of the adoption of a daughter or grandchild, a single sale was sufficient to extinguish the original *patria potestas*. In Justinian's time, the adoption was accomplished by a simple declaration before a magistrate recorded in writing. The assent of the adopted person was not required.

§ 57. **Effect of Adoption.**—By arrogation the person arrogated (*arrogatus*) passed under the *potestas* and acquired, in turn, all the rights of succession, etc., of a legitimate child. If he had children, they became the grandchildren of the arrogator. So, also, the property of the person arrogated be-

came the property of the arrogator, so that if the arrogated person should afterwards be emancipated by his adoptive parent, he would lose his property. According to the *Jus Civile* all contractual obligations of the person arrogated were extinguished by the arrogation; but the prætor allowed creditors to recover from the arrogator to the extent of the property acquired by the arrogation, or to subject the property itself to their claims.

By adoption the person adopted passed under the *potestas* of the adoptive father, but his children, if any, remained under the potestas of their original *paterfamilias*. The person adopted acquired the right of succession of a legitimate child of his adoptive father, but lost his rights of succession in his original family. And if emancipated, the person adopted would have been deprived of his rights of succession in both families. Not being *sui juris* when adopted, he would, of course, have no property or debts to be effected by the adoption.

§ 58. Changes by Justinian. By the time of Justinian the institution of adoption had lost most of its primitive character. The importance of the family tie, and of the legal personality of the individual *paterfamilias* had largely ceased to be regarded. There were no longer any sacred family rights to maintain. Justinian radically changed the law as to the effect of adoption by enacting that the person adopted should not pass under the *potestas* of his adoptive father, but should remain in his own family, the only effect of the adoption being to give the adopted child the right of succession as a legitimate child of his adoptive father, without losing his rights of inheritance in his old family. The only case in which the adopted child passed under the *potestas* of the adoptive father was where the latter was the natural ascendant of the child. Justinian did not change the law as to the effect of arrogation.

3. The Law of Guardian and Ward.

§ 59. In General. The Roman law included an elaborate system of guardianship. The power of a guardian was a form of family power, which took the place of paternal power in cases in which there was no one to exercise the latter. Guardianship was established in favor of persons who, although legally independent (*sui juris*), and hence not under *potestas,* were nevertheless under certain incapacities of fact or law which prevented them from being fully able to look after their own affairs. Such persons were (1) persons under age; (2) women; (3) spendthrifts; and (4) insane persons (lunatics).

The Roman law recognized two general types of guardianship, *tutela* and *cura*. *Tutela* was employed for two classes of persons: (1) persons under the age of puberty; (2) women. *Cura* was employed for (1) persons above the age of puberty, and under twenty-five (*pubes minores*); (2) spendthrifts; and (3) lunatics.

Guardianship seems to have been originally in Rome an extension of the *patria potestas,* both in the case of women and male children, and as to the latter is described by Sir Henry Maine, as being "a contrivance for keeping alive the semblance of subordination to the family of the parent up to the time when the child was supposed capable of becoming a parent himself." The *tutela,* however, differed radically from the *potestas* in that, whereas the powers of the *paterfamilias* were in the nature of ownership, the powers of the tutor were given him in trust for the exclusive benefit of the *pupillus,* and the tutor is not allowed to reap any personal advantage therefrom. The *tutela* was altogether for the benefit of the *pupillus,* not of the tutor.

§ 60. The Guardianship of Minors—In General. With respect to legal capacity, minors were divided into three classes: (1) Persons who had not yet completed the seventh

year. Such a child was an *infans* ("incapable of speech"), and was incapable of performing any juristic act whatever. (2) Persons who had completed the seventh year but had not yet completed the twelfth year, in the case of females, or the fourteenth year, in the case of males. These were *impubes,* the age of puberty being fixed at twelve for females and fourteen for males. The *impubes* were capable of some juristic acts, but were incapable of others. (3) Persons above the age of puberty but who had not completed the twenty-fifth year. These were called minors (*minores viginti quinque annis*).

There were two stages in the guardianship of minors corresponding with the age of the minor. The guardianship of minors under the age of puberty was called *tutela impuberum,* and that of minors above the age of puberty and under twenty-five was called *cura minorum.* A guardian of the first class was called a tutor, and a guardian of the second class was called a curator.

§ 61. Same—Tutor and Pupil—In General. Tutors were appointed for children under the age of puberty. The office of tutor resembled somewhat that of the guardian in English law, but corresponded more nearly to that of the English trustee. The duties of the tutor had to do chiefly with the property and contracts of the child, and only to a limited extent related to his person. It was, indeed, the duty of the tutor to see that provision was made for the custody and education of his *pupillus,* but he was not required personally to undertake this task. Usually, when the child's father appointed the tutor by will, he made provision in the will also for the custody and education of the child. The person named in the will obtained the custody unless the child's relatives objected and the prætor sustained the objections. If no one was named in the will, the child's mother was entitled to the custody so long as she remained unmarried. If the tutor or the child's relatives objected to the

mother's having the custody, the prætor settled the question, having regard to the mother's character and position.

The tutor was bound to make a proper allowance out of the property of the *pupillus* for his support, but not out of his own property if the *pupillus* had none. The amount of the allowance might be fixed by the instrument appointing the tutor, or by the prætor upon the application of tutor or *pupillus,* or by the tutor upon his own responsibility if he acted in good faith.

The office of tutor was regarded as a sort of public office the acceptance of which was obligatory on those who were duly nominated. Although the tutor received no compensation, he could not refuse to perform this public duty. However, numerous excuses, of no present interest, were recognized which often enabled persons nominated to claim exemption from service. Before entering upon the discharge of his duties the tutor was required to give security, though tutors appointed by will or by the superior magistrates were exempt from giving security.

The *tutela* ended with puberty of the pupil, and also by the death or change of status of either tutor or pupil, or by the discharge of the tutor by a magistrate for cause, or by the expiration of the period for which the tutor was appointed.

When the *pupillus* reached the age of puberty, it was the duty of the tutor to inform him of that fact and urge him to seek a curator to manage his affairs during his minority, i. e., until he was twenty-five. It was also his duty to render an account and settle with his *pupillus.*

§ 62. Same—The Several Kinds of Tutors.

(1) *Testamentary Tutors.* These were appointed by the will of the deceased *paterfamilias* of the pupil. This mode of appointment was authorized by the Twelve Tables.

(2) *Statutory Tutors.* These succeeded to the *tutela* by virtue of the provisions of the Twelve Tables or of some other

statute, but only if there were no testamentary tutors. They were called *legitimi tutores*. They were the agnates (by Justinian's legislation, the nearest of kin, whether agnates or cognates) who in case of the death of the pupil would succeed to his inheritance. They were appointed upon the principle that those who had the advantage of the inheritance ought to bear the burden of the *tutela* (*ubi emolumentum successionis ibi et onus tutelæ*). In this connection may be mentioned also the guardianship of the patron over his freedman, and of the father over his emancipated child.

(3) In the absence of a testamentary or statutory tutor, power was given to certain magistrates to appoint a tutor. Tutors so appointed were called *tutores dativi*.

NOTE.—A woman could not exercise the office of tutor, but during the later Empire it became the practice to appoint a mother tutor to her children in the absence of a testamentary or statutory tutor. After several enactments on the subject, Justinian finally excluded women from the office of tutor, except in the case of mothers to their children and grandmothers to their grandchildren. (Hunter, 918.)

§ 63. Same—Same—The Powers and Duties of Tutors. The duties of the tutor with respect to the care and management of the child's property were substantially those of an English trustee. Generally, he was required to administer the property of the *pupillus* as a prudent man would do, and if in consequence of the tutor's deliberate disregard of duty (*dolus*), or want of due diligence (*culpa lata aut levis*) the *pupillus* suffered loss or failed to gain an advantage that could, with due diligence, have been obtained for him, the tutor must make good the loss. And the tutor could not be released from responsibility even by an express clause in the will appointing him, for the *tutela* was a public office, the duties of which could not be modified by private arrangements.

A child under the age of puberty possessed very little legal capacity, even though *sui juris* in the sense of not being under

power. He could not bind himself by contract, and there were some legal transactions, as acquiring an inheritance, which even though they might be wholly beneficial to him, required the authority of a tutor to be effective. The child, even though he had no property, had need of a tutor to supply the requisite legal force to certain juristic acts. And while still an *infans,* that is, before he had completed his seventh year, the child could not bind himself by contract, even with his tutor's authority.

The general rule was that a child over seven and under the age of puberty might better his condition, even without the authority of his tutor, but he could not make it worse without such authority. Thus in contracts creating obligations on both sides, such as sales, letting to hire, or deposit, if the tutor did not give his authority, those contracting with the child were bound, but the child was not in turn bound to them. No *pupillus* of either sex could dispose of any of his property without the tutor's authority, though property could be conveyed to pupils of either sex without such authority. In certain cases, even though for his own benefit, the pupil could not act without the consent of his tutor. Thus he could not, without his tutor's authority enter on an inheritance, demand the possession of goods, or accept an inheritance by way of trust, even though such act was advantageous to him and involved no chance of loss. Ordinarily, however, the assistance of the tutor was required only where the effect of the act was to alienate property or to impose a liability.

But although a pupil could not bind himself by contract to a third person without the consent of his tutor, this rule was subject to certain equitable restrictions in favor of the other party. The pupil could not keep what he had bought and refuse payment, nor demand back what he had sold without returning the purchase money.

The consent of the tutor to the transaction was required to be given at the time of the transaction, but was not necessarily in any particular form. In giving or withholding his consent

the tutor was bound to act solely with a view to the advantage of the pupil, and to act with due prudence. If he gave his consent improperly he was responsible to the pupil for any resulting loss. If the child was still *infans* (under seven) the tutor acted on behalf of the child (exercising the right of *gestio*), but if the child was over seven, the child himself acted, with the assistance of the tutor. In giving his consent the tutor was not regarded as making the contract for the child; the child was regarded as the contracting party, but he was not bound by the contract unless the tutor consented. Actions brought by or against a pupil under seven were brought or defended by the tutor in his own name; but if the pupil was over seven the suit was brought or defended in the pupil's name with the tutor's consent.

§ 64. Curators. By the Roman law a male became of age for all purposes upon reaching the age of puberty. Females, at least under the older law, never attained full legal capacity. Plainly, however, a law which gave to a boy of fourteen full power to manage his own affairs was unsafe for him, and modifications were introduced from time to time for his protection. By an early law of uncertain date passed for the relief of minors (*lex Plætoria*), they were permitted to apply to the prætor for the appointment of a form of guardian known as a curator, who would be appointed on proof of the minor's incapacity to manage his own affairs. And in time it became the rule for magistrates to appoint a curator upon the minor's application. But a minor above the age of puberty could not be compelled to have a curator, except when, on being sued, he neglected or refused to apply for a curator, in which case a curator would be appointed on petition of the plaintiff to defend the suit.

The duties and powers of curators were substantially the same as those of the tutor. His chief function was to see that the minor was not imposed upon. If a curator was appointed, the position of the minor so far as his capacity to contract was

concerned was substantially the same as that of a pupil. All contracts by which he improved his position were valid without the curator's consent, but the minor could not alienate his property nor incur any liability without such consent, which, however, might be given either before, during, or after the transaction.

But if no curator was appointed, the minor could make any contract and bind himself thereby, subject, however, to a remedy provided by the prætor, who granted the right to have the transaction rescinded (*restitutio in integrum*), if undue advantage was taken on the minor's youth, or if, even without any fault of the other party, the minor made a bad bargain. This relief was administered upon equitable principles; no relief was given where the minor had himself been guilty of fraud. And if the minor on attaining the age of twenty-five ratified any contract previously made by him, it thereby became binding on him.

Curators were also appointed for the insane (*furiosi*) and for spendthrifts (*prodigi*). These forms of guardianship dated from the time of the Twelve Tables.

§ 65. Guardianship of Women (Tutela Mulierum). According to the old Roman law a woman never attained full legal independence. She was always under either the *patria potestas,* the *manus,* or the guardianship (*tutela*) of a tutor. A woman who was *sui juris* (not under *potestas* or *manus*) could not bind herself by any transaction nor conclude any juristic act of the *Jus Civile* (*negotium juris civilis*) such as *mancipatio, in jure cessio* or making a will, without the concurrence (*autoritatis interpositio*) of her tutor. This subjection of women was early recognized as unreasonable, and in time was abolished. As Gaius says: "For keeping women of full age under a tutor almost no reason of any worth can be urged. For the common belief that from the levity of their disposition they are often deceived, and may, therefore, in

fairness, be guided by the authority of tutors, seems plausible rather than true" (Gaius, I, § 190).

Tutors might be appointed by will of *paterfamilias* or of husband of wife *in manu* (*testamentarii tutores*), or in the absence of testamentary tutors, women as tutors had their nearest male agnates (*legitimi tutores*). And in the absence of any other tutor, the magistrates might appoint tutors (*dativi tutores*). In the case of testamentary appointment there was a practice in the time of Cicero to leave the name of the tutor in blank in the will and allow the woman to fill it up.

The requirement of the tutor's consent to the woman's transactions in time degenerated into a mere form, and at a comparatively early period she had power to compel him to give his consent, and except in matters of the *Jus Civile*, consent was not required. The agnates as guardians (*legitimi tutors*) had, indeed, more authority, and could withhold consent in certain cases, but this form of guardianship was abolished by the *lex Claudia* (A. D. 47). The entire law of guardianship of women was obsolete in Justinian's time. There remained only the guardianship of females, as in case of males, as minors.

PART II. THE LAW OF OBLIGATIONS.

§ 66. In General—Definitions. An obligation in Roman law was a duty which one person owed to another or the right which that other had to the performance of that duty. As the etymology of the word indicates (from *ob,* about, and *ligo,* bind), an obligation is a *bond* binding two persons together. It is the basis, or rather the correlative, of a right *in personam.* The essence of an obligation is that it *binds* one person to give something to or to do something for another.

In the classical period of Roman law an obligatory right was the right to require another person to do some act which was reducible to a money value. The term obligation was used in Roman law in a wider sense than in modern law in that it denoted not only the duty but also the right. It applied to the person who enjoyed the right as well as to the person who was subject to the duty. As contrasted with ownership (*dominium*), which might be asserted against all the world, an obligatory right (a right *in personam*) might be asserted against the debtor alone. It was simply the right to require a particular person to act in a particular way.

The parties to an obligation were called creditor (*creditor*), the party entitled to performance, and debtor (*debitor*), the party from whom performance was due. These terms were originally confined to the case of loans, but were afterwards extended to denote the parties to any obligation. The relation of creditor and debtor, unlike the family relations, did not produce or imply the personal subordination or subjection of the debtor to the creditor. The creditor had no general power of control over the acts of the debtor, but merely a right to require him to do some particular act. And the acts that could be thus required were confined to acts reducible to a

money value, though the particular act might be the delivery of property or the performance of some work or service, as well as the payment of a sum of money. The debtor could always get rid of or discharge himself from the obligation by surrendering a corresponding portion of his property to his creditor. The obligation was a deduction from the debtor's property merely, and not from his liberty.

§ 67. Classification of Obligations. According to Justinian, the leading division of obligations was into two kinds, civil and prætorian. The civil obligations (*civiles obligationes*) were those established by statute, or at least recognized by the *Jus Civile;* the prætorian obligations were those established by the prætor in the exercise of his jurisdiction. The latter were also called honorary (*honoriæ obligationes*). By another division, obligations were of four kinds, those arising from contract (*ex contractu*), or from quasi-contract, and from delict (*ex delicto*), and from quasi-delict, or, as we would say, obligations arose either from contract or quasi-contract, or from tort or quasi-tort. (Inst. III, 13, 1-2. See also Gaius, 3, 88).

1. The Law of Contracts.

§ 68. Consent as Basis of Contract. While the Romans did not regard consent as the legal basis of a contract (except in the case of the Consensual Contracts), they in later times fully recognized the principle that contracts are in fact the result of consent (see Dig. 44, 7, 3, 1). And in a legal sense two or more persons are said to consent when they agree upon the same thing in the same sense (Dig. 2, 14, 1, 2). We are now to consider several circumstances which might prevent a legal consent.

§ 69. Error. An error may be essential error (*error in corpore*) which is such as prevents the parties from agreeing upon the same thing in the same sense, and which thus prevents

the contract from arising, or vitiates the contract; or the error may be non-essential (*error in substantia* or *materia*) which exists when the parties agree upon the same thing in the same sense, but one party, unknown to the other, is mistaken as to the nature of the thing. Whether a so-called non-essential error would vitiate the contract depended somewhat upon the materiality of the error.

Essential error might relate to the identity of the thing, or to the nature of the obligation to be assumed, or to the person of the promisee. Thus one might stipulate for a certain slave while the other party is thinking of another slave (Inst. III, 19, 23); or one might offer to let his farm, and the other, misunderstanding the offer, might agree to buy it (Dig. 44, 7, 57); again, one might agree to loan money to Titius, a reputable man, but, being imposed upon, pays it to another Titius who impersonates the party intended (Dig. 47, 2, 52, 21; Ib. 47, 2, 66, 4). In all the above cases there is no contract. But a mistake merely in names is immaterial, as where two persons are negotiating for the purchase and sale of a piece of property which they know by different names. This contract is good. (*Nihil enim facit error nominis, cum de corpore constat.* Dig. 18, 1, 9, 1.)

Cases of non-essential error seem to have occurred most frequently in sales, as where a person bought an article thinking it was gold, when it was bronze, or thinking it solid silver, when it was only plated, the seller being ignorant of the buyer's mistake, and having no intent to defraud. The authorities do not seem to afford any definite or absolute rule as to the effect of non-essential error. In the above cases the sales were held void, though not without authority to the contrary. The decisions probably turned upon the materiality of the error, a matter depending upon the circumstances of each case. A difference merely of *quality,* as where a thing bought as of gold was largely alloy, would not vitiate the sale (Hunter, 580-584; Sohm, 210).

§ 70. Duress and Fraud. The formal contracts of the *Jus Civile* derived their legal force from the exact performance of their respective forms. Of course the parties must have consented to observe these formalities, but it was the form, not the consent, that gave binding force to the contract. Hence formal contracts were binding by the *Jus Civile* if made in proper form, even though procured by force or fraud. But in later times the prætor allowed either duress or fraud to be set up as a defense to an action on the contract. The informal contracts, being *bonæ fidei* contracts were not binding if made through fear or induced by fraud.

Duress. The duress might take the form of violence (*vis*) or of intimidation (*metus*). Violence was the actual exercise of superior force; intimidation was the employment of threats of evil sufficient to overcome the resolution of a person of ordinary firmness. It was immaterial whether the duress was exercised by the other party to the contract or by a third person. In either case it constituted a good defense. Thus a promise extorted by a threat of death or bodily torment, or by confinement of the person, was voidable. But duress did not invalidate a contract unless the duress was unlawful. Thus where a prætor, in the exercise of his lawful authority, required a defendant to promise to save his neighbor harmless if his house should fall to the injury of the neighbor, by threat to give the house into the custody of the complainant, the promise was valid. But a promise of money extorted by a magistrate from an innocent person by a threat to condemn him to death, was not binding, this being an illegal exercise of power (Hunter, 593; Sohm, 209).

Fraud (Dolus). Unlike duress, the defense of fraud was available only when the fraud was perpetrated by a party to the contract. The fraud of a third person did not vitiate the contract, but the party defrauded had a right of action for the fraud (*actio de dolo*) against the perpetrator. As in the case of English law, fraud in Roman law was a very com-

prehensive term, and seems to have been nowhere precisely and accurately defined. It might consist either in the making of a false representation (*suggestio falsi*), or in the concealment of the truth (*suppressio veri*) (Hunter, 596-597; Sohm, 209).

§ 71. Illegal Consideration. A contract induced by an illegal consideration (*injusta* or *turpis causa*) was not enforceable, even though the thing promised was itself lawful. The illegality of the consideration could be pleaded as a defense (Hunter, 598).

§ 72. Failure of Consideration. A special form of fraud was recognized in the attempt to enforce a formal contract induced by a consideration that had failed. The Romans did not fully attain the English doctrine of a valuable consideration; a formal contract did not need a consideration to support it; but if there was in fact a consideration intended, which was the real inducement of the promise, and this consideration failed, it was deemed a fraud to insist upon performance. The consideration having failed, the promise was said to be *sine causa*, and in an action thereon the defense of fraud could be set up. The effect of the admission of this defense, after it became allowed, was that it rendered even a formal contract (stipulation) non-enforceable unless made gratuitously or for a consideration that did not fail (Hunter, 597).

§ 73. Impossible Promises. A promise to do what could not be done was not binding (*impossibilium nulla obligatio est*). A thing was impossible when it was something that no one could do, not merely something which the promisor could not do. The promise might be to do an act physically impossible, as a promise to give something that does not or cannot exist, as a slave that has died, or a "hippocentaur;" or legally impossible, as to give something which could not be privately owned, as a forum, theatre, or burial

place. So if one agreed to buy what, unknown to him, was already his own, there was no contract, for what is a man's own cannot be given to him. But if a man agreed to give something which, although he did not own it, was yet in existence and capable of being given by the owner, for example, 100 pounds of copper, the contract was valid, for the impossibility existed only when none could perform the promise.

An impossible promise was not binding though neither party or both parties knew of the impossibility. But if a person knowingly made an impossible promise to a person ignorant of the impossibility, the promisor was liable to the promisee in an action of deceit for any loss sustained. And if the promisee knew of the impossibility but the promisor did not, the promisee was bound on his part. Thus if the vendee of a house knew that at the time of the sale the house was burnt, but the vendor did not know, the sale was good and the vendee liable for the price (Hunter, 598).

§ 74. Illegal Promises. A promise to do anything contrary to law, good morals, or public policy, was void, for example, a promise to commit murder or sacrilege or theft. Numerous examples occur in the Digest setting forth the Roman conception of morality and public policy. Thus a promise that one of the parties to a contract should not be responsible for his wilful acts and defaults was void, as was also a promise to give a sum of money if the promisor did not make the promisee his heir, it being discreditable to be casting eyes on a living man's inheritance. A stipulation "If I marry you, will you give me 10 aurei?" was void unless the money was intended as a dowry, because it introduced a mercenary element into marriage. And a stipulation "If a divorce occurs by your fault, will you give me 10 aurei?" was void because it interfered with the freedom of divorce, and because also the parties ought to be content with the penalties for divorce fixed by law. But a promise in such case not exceeding the legal penalties was valid. An agree-

ment to conduct a lawsuit for another for a share of the amount recovered was void, but money might be loaned at not more than the lawful interest to support a suit (Hunter, 600-601).

§ 75. Contracts Stricti Juris and Bonæ Fidei. There were some contracts in Roman law which gave rise to a definite and precise liability (*certa obligatio*) and which bound the parties to an exact performance of that which they promised, but which were fully discharged by exact and literal performance. These contracts were called *stricti juris negotia*. Other contracts required the parties to perform not only what they had actually promised, but also whatever else would be fair and reasonable in the circumstances of the particular case. They gave rise, therefore, to an uncertain obligation (*incerta obligatio*) which would vary more or less with the circumstances of the case. Contracts of the latter class were called *bonæ fidei negotia* (Sohm, 367). Examples of each class will be found in the sections to follow.

§ 76. Classification of Contracts According to Basis of Obligation. In Roman law not every promise was legally binding, even though it might have been intended to create an obligation. In addition to the promise, there had to be some recognized legal ground (*causa civilis*) to give legal force to the promise. Of these grounds there were four, giving rise, respectively, to four classes of contracts that constituted the contractual system of the Romans. "Contracts," says Justinian, "are made by acts, by words, by writings, or by consent." (Inst. 3, 13, 2. See also Gaius, 3, 89.)

Expanding this somewhat, the four grounds are: (1) the delivery of a thing (*res*) or the performance of some act by one party entitling him to re-delivery or counterperformance by the other. This was the basis of the Real Contracts. (2) The use of a certain form of expression, that is, question and answer, in oral contracts, which was the basis of the Stipulation or Verbal Contract. (3) The use of a certain mode

of writing, that is, an entry in a domestic account book, which was the basis of the *Expensilatio* or Literal Contract. (4) Mere consent in four special cases called Consensual Contracts.

The first ground was equitable, and the Real Contracts may, therefore, very properly be called equitable contracts. The second and third grounds were purely formal, and the contracts based thereon may be called the Formal Contracts. The Consensual Contracts, with one exception (*mandatum*) might have been supported on the ground of valuable consideration, but the notion of valuable consideration as the basis of contract, so prominent in English law, was not recognized by the Romans.

§ 77. Formal Contracts—In General. The early contracts of the Romans derived their binding force merely from their form. Neither consent, consideration, part performance, nor anything else than the going through with a certain form or ceremony was of any legal significance.

There were three kinds of formal contracts, (1) *Nexum,* (2) Verbal Contracts, and (3) Literal Contracts. The formal contracts belonged to the *Jus Civile.* The authorities are not agreed as to the relative antiquity of these contracts, but they were all ancient. Only one, the Verbal Contract, was employed in the time of Justinian. We shall consider each one separately.

§ 78. Nexum. This was an ancient contract made by the ceremony of mancipation, *per æs et libram.* Very little is known about it. Its application seems to have been very narrow, perhaps limited to the contract of loan. It was obsolete from a very early date.

§ 79. Stipulation or Verbal Contract. The stipulation (*stipulatio*) was the chief formal contract of the Romans. Its origin is unknown. It may be traced back to the earliest times, and it survived in full force, though slightly modified in form, until the dissolution of the Empire.

It was made by words (*verbis*) and hence it is called the verbal contract. Its form consisted in question and answer. One party would ask the other if he would promise so and so, and the other would reply that he so promised, and this promise, made in response to the question, constituted the contract. But the same promise made directly, without previous question, had no legal force. The promise might relate to anything whatever, unless to do an act illegal, immoral, impossible, etc., and hence this form of contract was universally available. As declared in the Institutes, "Anything, whether movable or immovable, which admits of private ownership, may be made the object of a stipulation." (Inst. III, 19, 1.)

The stipulation was unilateral. It bound only the promisor. If, therefore, it was desired to make a contract with reciprocal promises, the single stipulation would not suffice. But such a contract might be made by the use of independent separate stipulations, each party making the desired promises in response to the appropriate questions.

Stipulation was a *stricti juris negotium*. It bound the promisor to do just what he promised, no more, no less. Thus if he promised to pay a certain sum of money, without promising to pay interest in case of delay in making payment, he was not bound to pay interest for such delay.

§ 80. Form of Stipulation. The form of the contract, as stated above, was question and answer, thus:

"Do you undertake that it shall be given (*dari spondes*)?" "I undertake it (*spondeo*)."

"Do you become surety (*fidejubes*)?" "I become surety (*fidejubeo*)."

The right to use the words "*spondes*" and "*spondeo*" was originally confined to Roman citizens, and it seems that anciently this verb was the only one that could be used to make the contract of stipulation, and the early name for the contract itself seems to have been *sponsio*. In later times less

attention was paid to form, and the use of other words was permitted which could be employed by either Roman citizens or aliens. The words used might be any words understood by the parties and the answer need not follow the precise terms of the question, and might even be in a different tongue. Thus the question might be in Latin and the answer in Greek.

By a constitution of the Emperor Leo (A. D. 469) all verbal formalities were abolished, and all that was necessary was that the parties should understand each other and agree to the same thing. The words in which the agreement was expressed were immaterial. But at least substantial agreement in the subject matter was essential. Thus if in response to a question "Will you give me 100 *aurei* before the Kalends?" it was answered "I will give you 100 *aurei* on the Ides," there was no contract, because the promisor agrees to a longer time than that asked for.

The person asking for the promise was called the *stipulator*, and the promisor was called the *promittor*. To stipulate meant, not to promise, but to ask for a promise. The form of the contract, question and answer, made it necessary that the parties should be in each other's presence; a promise made not to the promisee in person was void.

§ 81. Written Stipulations. A stipulation was essentially an oral contract, but there was no legal objection to reducing it to writing, and this practice became common. And although the stipulation did not at all owe its binding force to the fact that it was in writing, this fact was an advantage in that (1) where the promise was in writing it was presumed to have been given in answer to a question, and (2) where the writing recited the presence of the parties, they were presumed to have both been present, in the absence of the clearest evidence to the contrary.

§ 82. Literal Contract. In the time of Justinian there were no contracts that derived their legal force from the

fact that they were in writing, or were written in any particular form. But during the Republic there existed a form of contract made in writing (*literis*) in the form of an entry in the account book (*codex*) of the creditor. This form of contract probably originated in the importance attached by the Romans to their books of account. The Romans were great book-keepers. Every well-to-do Roman kept his domestic account books just as a modern business man keeps his business books. We are told that the censor, at the making of the census, required every citizen to take an oath that his books were accurately and honestly kept.

The literal contract consisted in an entry (*expensilatio* or *nomen transscripticum*) made by the creditor in his account book, with the consent of the debtor, to the effect that he had paid a certain amount to the debtor. The debtor usually made a corresponding entry in his book that he had received the sum stated, but this appears to have constituted no part of the contract and to have been unnecessary. The debtor's liability depended upon the creditor's entry alone. This *created* the obligation, and was not merely the evidence of an existing obligation. It was the entry of a fictitious payment, but, of course, it doubtless represented some actual transaction not amounting in itself to a legal contract. The exact details of this form of contract, how this particular entry differed from other entries in the account book, etc., have not come down to us. It is probable that the literal contract was usually employed, not for the purpose of originating an obligation, but of transforming an existing obligation, perhaps not in legal form, into a legal obligation based upon an entry in the account book.

§ 83. Chirographum and Synographæ. The practice of keeping domestic accounts was already becoming obsolete in the time of Cicero, and with the passing of this practice the literal contract of *nomen transscripticum* became obsolete. It was superseded by detached writings, the *chirographum*

signed by the debtor only and kept by the creditor, and *synographæ*, signed and kept by both parties. As indicated by their names, these forms of contract were of Greek origin. They were in common use in the time of Cicero, and existed in the time of Gaius, but were obsolete in the time of Justinian.

§ 84. Cautio. Although in Justinian's time there were no contracts deriving their force from the fact that they were in writing, written acknowledgments of indebtedness were in use. Thus a man who gave a written acknowledgment of a loan was estopped thereby after the lapse of two years—the period having been reduced from five years by Justinian—to deny that he had received the money. Such an acknowledgment—known as a *cautio*—was not a contract; it did not create a debt, but was merely evidence that a debt existed. This evidence was *prima facie* only until two years had elapsed, when it became conclusive. The *cautio* seems to have grown out of the *chirographum*, but with this radical difference, the *chirographum* created a debt while the *cautio* was merely evidence of a debt. (See also ante, § 81.)

§ 85. Informal Contracts—In General. Besides the formal contracts just considered, there were some important contracts whose binding force did not at all depend upon the contracts being made in any particular form, but was based upon very different considerations. The most important of these informal contracts were the two groups of contracts known as Real Contracts and Consensual Contracts.

§ 86. Real Contracts—In General. The group of contracts known as real contracts derived their binding force, not from the observance of any form, but from some act or fact. They were essentially contracts of an equitable nature, and were introduced by the prætor, though probably by a modification of earlier forms of contract.

There were two classes of real contracts, nominate or named, and innominate or nameless real contracts.

There were four nominate real contracts, or as they were usually called, simply real contracts: (1) Mutuum, (2) Commodatum, (3) Depositum, and (4) Pignus. The general ground of obligation in these contracts was the delivery of property by one person to another under conditions making it the duty of the person receiving the property to return either the identical property, or (in the case of mutuum) other property of the same kind. It was the delivery of the *thing* (*res,* whence the name *real*) that imposed upon the person receiving it the duty to return it.

The history of these contracts is obscure. They appear to have been derived from earlier formal contracts, but in the form in which they have come down to us they were introduced by the prætor. Except mutuum, they were *bonæ fidei negotia,* and both parties were bound to do not only what they expressly agreed, but also whatever was required by good faith. Mutuum, however, was a contract *stricti juris.*

§ 87. Mutuum (Loan for Consumption). The contract of mutuum was a loan of fungibles, that is of articles that are consumed in the using. It arose whenever one person delivered to another things dealt in by weight, measure, or number, such as oil, wine, corn, money, bronze, silver, or gold, with the intention that the transferee should become the owner of the things delivered, subject to an obligation on his part to return, not the identical things received, but others of the same kind, quality and amount. Mutuum, unlike the other real contracts, was a *stricti juris negotium.* The action to which it gave rise and by which the borrower was forced to make return was *condictio certi.*

Mutuum was a gratuitous loan. The buyer was required to return only the exact amount of property (oil, money, etc.) that he had received, even though guilty of delay in

making return. Even in the case of a loan of money interest could not be recovered on the contract of mutuum.

How Made. The contract was made by the simple delivery of the property. Actual delivery was essential unless the borrower was already in possession. Since it was contemplated that the borrower should become the owner of the property, the lender had to be himself the owner; unlike the other real contracts, which could be created by one having merely possession, the contract of mutuum could be created only by the owner of the property.

§ 88. Loans on Interest. Although interest could not be recovered on the contract of mutuum for money loaned, it is not to be supposed that the Romans were in the habit of lending money without interest. In the case of a loan of money interest was provided for by a second contract in addition to the principal contract of mutuum, the agreement to pay interest being made by the verbal contract of stipulation. The lender would ask the borrower "Will you pay me such and such monthly interest?" and the borrower would answer in the affirmative, and thus become liable to pay the agreed interest, not on the real contract of mutuum, but on the verbal contract of stipulation. Stipulation was always required in the case of loans of money, but in later times an informal agreement for the payment of interest was enforced in the case of a loan of fungibles other than money.

The Romans always had a hatred for usury and usurers, and the amount of interest that could be charged was carefully regulated. The Twelve Tables fixed the legal rate at 1/12 of the principal per annum (or some authorities say 12 per centum. Muirhead, 91 note), and a lender who exacted more than the legal rate was liable in fourfold damages. The rate was afterwards reduced to 1/24 of the principal, and by the *lex Genucia* (B. C. 340) interest was prohibited altogether. Notwithstanding this legislation, the

recognized maximum rate of interest from the close of the Republic was 1% a month or 12% per annum. Justinian finally fixed a scale of interest rates varying from 4% per annum to agriculturists and high personages to 12% on maritime loans. To ordinary persons not in business the rate was 6%, and to merchants and other business men 8%. A contract for the payment of excessive interest was void only as to the excess. Interest was computed by the month, but was not necessarily paid monthly. Compound interest (interest upon interest) was not allowed. Arrears of interest could be recovered only to the amount of the principal debt.

§ 89. Loans to Persons under Power. An interesting restriction on the power of making loans was created by the *Senatus Consultum Macedonianum* passed during the early Empire. This enactment rendered loans to persons under power not actionable. According to Justinian the statute was passed because it was found that persons in power loaded down with debt for money borrowed and squandered often plotted against the lives of their parents. Presumably upon the death of their parents they would inherit means of paying their debts. This statute did not make loans to persons in power void, but only denied an action to the lender. If the loan was repaid without action, the money could not be recovered back on the plea that it was not owed. The statute applied only to loans of money, and certain cases were exempted from its operation, namely, loans on the son's *peculium*, or made with the father's consent, or for the benefit of the father's estate, or for necessaries, or in the honest belief of the lender that the borrower was *sui juris*.

§ 90. Commodatum (Loan for Use). A commodatum was a loan of property for the use of the borrower. It arose whenever one person (the *commodator*) delivered a thing to another (the *commodatorius*) for the latter's gratuitous use. It was a contract of prætorian origin and a *bonæ fidei nego-*

tium, both parties being bound to do everything required by good faith.

The contract was made by the mere delivery of the property for the contemplated use. The borrower did not become the owner of the property, he got merely the right as against the lender, to the use of the property. Hence a person not the owner of the property—even a thief—could give a thing in commodatum. The transaction was gratuitous; if the borrower was to pay for the use, it was a contract of hire.

The borrower was required to exercise the highest care (*omnis* or *exacta diligentia*), to take as good care of the thing lent as a good *paterfamilias* would bestow, not merely such care as the particular borrower usually bestowed upon his own affairs. If the thing was lost or injured through any fault of his own, he was liable, but not for loss or injury by accident or from causes beyond his control. For loss by theft the borrower was liable, for it was considered that such loss could be prevented by due care, but the borrower was not responsible for loss by robbers. But if the borrower used the thing for a different purpose than that for which it was borrowed, he was liable for loss or injury even without his fault. Thus if one borrowed plate to be used at a supper, and instead took it on a journey and it was stolen by robbers, the borrower was liable. And a borrower who thus made a different use of the thing borrowed was also liable to an action for theft unless he supposed that the lender would have consented to such different use. For default by the borrower the lender had an *actio commodati directa.*

The borrower derived all the benefit from the contract, and ordinarily the lender was under no special duty to him, but after delivering the thing to the borrower he was obliged to let him enjoy the use of it as agreed. He had also to pay extraordinary expenses in caring for the thing, but the borrower had to pay ordinary expenses, such as food or trifling medical expenses for slaves borrowed. The lender was liable

to the borrower for fraud (*dolus*) or gross negligence (*culpa lata*). Thus if a man lent vessels to hold wine or oil knowing that they were leaky, he was liable for the value of the wine or oil lost. The borrower's rights were enforced by an *actio commodati contraria.*

It will be observed that the English law relating to gratuitous loan for use, which was formerly known by the Roman name of *commodatum,* is practically the same as the Roman law.

§ 91. Depositum (Deposit for Custody). Depositum was a contract by which one person (*depositor*) delivered a thing to another (*depositarius*) to keep for him gratuitously and to return it on demand. It was a contract of the *Jus Gentium,* and a *bonæ fidei negotium.* It was distinguished from Mutuum in that the ownership of the property did not pass to the depositary, and from Commodatum in that the depositary had no right to use the property. As in the case of the other real contracts, the contract of deposit was created by the delivery of the thing to the depositary.

The contract was for the sole benefit of the depositor and the depositary was liable only for fraud (*dolus*) or for loss or injury caused by some positive act of commission on his part. He was not liable for mere inattention or passive negligence. He was bound to return the thing on demand. The depositor was required to pay all expense incident to the custody of the thing, and also all damages to the depositary caused by the thing deposited if he knew it was likely to cause damage, for example, where one deposited a slave whom he knew to be dishonest. The depositor had an *actio depositi directa* against the depositary, and the latter had an *actio depositi contraria* against the depositor.

It will be observed that the Roman law of deposit was substantially the same as the English law of deposit.

§ 92. Pignus (Pledge). Pignus was a contract in which a debtor delivered a thing to his creditor as security for the

debt. The delivery of the property gave rise to the obligation on the part of the pledgee to return it upon the payment of the debt. This was a right of the pledgor against the pledgee personally (*in personam*), and the pignus belonged to the law of contracts only in respect of this personal obligation. The creditor had also certain real rights in the thing pledged, and in this respect the pignus was an important step in the law of mortgage.

The contract of pignus was a *bonæ fidei negotium*. The contract was for the benefit of both parties, of the pledgor (debtor) because he thereby obtained credit, of the pledgee (creditor) because he obtained security. Hence both parties were responsible for the highest care (*omnis diligentia*). The pledgee was bound to return the property upon payment of the debt, or, in case he exercised the right of sale (which he might do if the debt was not paid), to pay to the pledgor the balance of the proceeds after paying himself the amount of the debt. The pledgor was bound to compensate the pledgee for expenses in connection with the custody of the thing pledged. To enforce their respective rights, the pledgor had an *actio pignoraticia directa*, and the pledgee an *actio pignoraticia contraria*.

§ 93. Innominate Real Contracts or Nameless Contracts. In addition to the four named real contracts just discussed, another class of contracts also considered as real contracts became actionable at a later period, to which the Romans gave no name but which are now known as innominate or nameless real contracts, or simply nameless contracts. They consisted essentially in the exchange of performance and counter-performance. The principle upon which they were enforced was that wherever there were mutual promises of performance and one party had done what he had agreed to do, he had the right, on the ground of such performance, to exact performance by the other party of his part of the agreement.

The mere exchange of mutual promises did not give rise to any legal obligation. Except in the case of the four so-called consensual contracts, the Romans did not recognize contracts based upon mere agreement, or the exchange of promise for promise. It was only when one party had performed his promise that he had any right of action against the other party. After one party had performed it would be inequitable to permit the other party to refuse counter-performance. The principle is analogous to that of the English so-called doctrine of part performance in the law of specific performance of contracts, though the Romans had no such remedy as specific performance, and the only remedy in case of non-performance was an action for the breach.

It is only by analogy that the innominate contracts may be called real contracts; the rendering of performance corresponds more or less closely with the delivery of the thing (*res*) in the true real contracts.

As the nature of the acts to be respectively performed by the parties might vary indefinitely, no attempt was made to give these contracts any fixed name, and they are now known simply as the nameless contracts. But although without special name, these contracts are comprehended in the well-known formula of Paul, as follows:

Either, I give you something in order that you may give me something (*do tibi, ut des*) or, I give you something in order that you may do something for me (*do ut facias*); or, I do something for you in order that you may give me something (*faci ut des*); or, I do something for you in order that you may do something for me (*facio ut facias*) (Dig. 19, 5, 5).

The above formula may be summed up by saying that the nameless contracts consisted in the exchange of either a thing for a thing, a thing for an act, or an act for an act. The contract of exchange more properly so-called, that is the exchange of a thing for a thing, was much like a sale, which, however, was a consensual contract while an exchange was

not. A mere agreement to exchange had no binding force until one of the parties had given what he promised. Then the other party became bound to deliver the thing which he had promised in exchange. Another difference from sale was that in exchange both parties were bound to give good title, and hence an exchange by one not the owner of the property was void.

§ 94. Consensual Contracts—In General. The Romans recognized several important contracts in which the obligation of the contract rested upon simple consent. Of this class there were four examples: sale, hire, partnership, and the peculiar contract of mandate. Since consent is the basis of contracts in English law, it is in the consensual contracts that we find the greatest resemblance in the Roman and English law of contract.

§ 95. Sales—In General. A sale in Roman law was a contract by which one person agreed to deliver a thing to another who, on his part, agreed to pay a certain price therefor. The contract was complete and binding as soon as the thing to be delivered and the price to be paid were agreed upon. No particular form was required. Writing was not necessary, but Justinian enacted that no sale effected by an agreement in writing should be good and binding unless the agreement was written out by, or at least signed by, the parties, or, if written by a notary, was duly drawn by him and executed by the parties. So long as any of these requirements remained unsatisfied, either party might withdraw with impunity, provided no earnest (*arrhæ*) had been given. But where earnest had been given, a party refusing to perform, whether the agreement was in writing or not, if the buyer, forfeited what he had given, and if the seller, had to restore double what he had received.

A sale was a *bonæ fidei negotium,* and the parties were required to do not merely what they had expressly agreed to do, but whatever else was required by good faith.

The thing sold might be either immovable property (lands, houses, etc.) or movables, and might be either corporeal or incorporeal.

A sale might be conditional, as, for example, a sale on approval (Inst. III, 3. 4).

§ 96. The Price. The price had to be in coined money. If anything else than money was to be given, the transaction was an exchange. And the price had to be certain. A contract leaving the price to be determined by the buyer was void. But the price might be left to the determination of a third party, and if that party fixed the price, the contract was complete, but if he did not, there was no sale. Although the contract had to be for a price in money, the seller might afterwards accept goods for the price.

Mere inadequacy of price, in the absence of fraud, was no ground for rescission, but by constitution of the Emperors Diocletian and Maximian it was provided that when a thing was sold for less than half its value, the seller might recover the property unless the buyer would pay the full value. It is a disputed point whether a corresponding remedy was given to the buyer in case the price was more than double the value of the property.

§ 97. Legal Object of Contract of Sale. The real object of every sale in Roman law, as well as in any other law, was to transfer the ownership of the thing sold, but by an anomaly of the Roman law, this was not what the seller contracted to do. His agreement was to deliver the undisturbed possession (*tradere vacuam possessionem*) of the thing to the buyer, not to confer title. The delivery of the possession would, indeed, pass the title if the seller was the owner; but even if the seller was not the owner, so that delivery could not pass title, yet he performed his contract if he delivered the property. It is suggested that this anomaly in the Roman law of sales grew out of the fact that there were many persons

in Roman society, for example, the *peregrini* or aliens, who were incapable of owning property, though they might enjoy possessory rights therein, and this limitation of the scope of the contract of sale was introduced so as to render these persons competent to participate in the making of these contracts. (Hunter, 369; Sohm, 399n.)

Where the seller was not the owner, the sale, of course, did not pass title, for no one is able to transfer to another a greater right than he himself has (*nemo plus juris ad alium transferre potest quam ipse haberet.* Dig. 1, 17, 54; City Bank *v.* Barrow, 5 App. Cas. 677), and in such case the owner of the property could recover it from the buyer. The latter, however, was not without remedy against the seller. The seller was bound to give *undisturbed* possession to the buyer and to compensate him in case of his eviction by law for any ground existing at the time of the sale, that is, his duty consisted in giving present possession and compensation in the event of future eviction.

This warranty against eviction might be embodied in an express agreement, in which case the damages were usually fixed at twice the purchase price; or it might, at least in later times, be implied, in which case the buyer was entitled to actual compensation for his loss. The express agreement or stipulation for damages for eviction, being a penalty, was construed strictly; the implied warranty, being an obligation of good faith, was construed more liberally and in the spirit of the contract of sale.

§ 98. Performance of Contract. It was the seller's duty to deliver the thing sold to the buyer, and if the thing was a *res mancipi,* the transfer had to be by mancipation. The seller's obligation to deliver possession was conditioned upon the buyer's paying the price; he was not obliged to deliver until the entire price was paid, unless the sale was on credit. If the buyer did not pay on delivery, he was liable for interest. And if the sale was on credit, interest was due

from the expiration of the credit. But if before the price was paid the seller's title was questioned, the buyer was not required to pay unless sureties were given to guarantee the return of the money in case of eviction. The payment of the price was essential to the passing of title, and even though the thing was delivered it did not become the buyer's property until the price was paid or secured, unless the sale was on credit, in which case the title passed on delivery. The buyer was bound not merely to pay the price, but to give a good title to the money; payment with money not belonging to the buyer was no payment.

§ 99. Risk of Loss—Intermediate Profits. Although the title to the thing sold did not pass to the buyer until the thing was delivered to him and the price was paid (unless the sale was on credit), yet when his title became complete by the delivery and payment, it was held to date not from the time of delivery or payment, but from the time of the making of the contract. The buyer was considered the owner from the time the thing was sold and the price agreed upon. Hence the property was held to be at the risk of the buyer from the date of the sale although not yet delivered to him. If the property was lost or destroyed before delivery without anyone's fault, the loss fell on the buyer and he was required to pay the price although he never received the property (*res perit domino*). Conversely the buyer was entitled to all the products or increase of the thing, in the absence of a contrary agreement (*cujus periculum, ejus et commodatum esse debet*). The buyer was also required to pay the expenses of keeping the thing prior to delivery. The above rule as to risk of loss could be set aside by an agreement that the thing should be at the seller's risk until delivery.

An exception to the general rule was made in the case of fungibles, that is, things sold by weight, number, or measure. These remained at the risk of the seller until weighed, counted, or measured for the buyer. If, however, they were not sold

by weight, number, or measure, but sold in a lot for a stated sum, they were at the buyer's risk. Thus, if a flock of sheep was sold for one sum for the lot, the risk was on the buyer from the time of the sale; but if sold at so much a head, then they were at the buyer's risk only from the time they were selected. (Dig. 18, 1, 35, 6.) There were also some other exceptions. (Hunter, 286.)

§ 100. Seller's Duty Prior to Delivery. Prior to the delivery of the property to the buyer the seller was required to take as much care of it as a good *paterfamilias*. If by reason of the buyer's fault the property was not delivered when agreed, the seller was responsible only for wilful misconduct or gross negligence. If the delay was due to the seller's fault, he was responsible even for accidental loss.

§ 101. Warranty of Quality. Up to about 150 B. C. it seems that the buyer had no remedy if the thing sold had faults unknown to the seller, unless there was an express warranty against faults by the formal contract of stipulation. But later it became the law that the buyer could rescind the sale or claim an abatement of price if the thing sold had undisclosed faults that interfered with its proper enjoyment. This addition to the law was due to the edict of the curule ædiles who had jurisdiction over the Roman markets. The effect of this edict was to create an implied warranty, in the absence of an express warranty, against certain faults in slaves, animals, etc., sold, and gave a remedy to the buyer in case of his subsequent discovery of undisclosed faults. It is said that long before this edict there had been a practice of requiring an express warranty in the case of sales of slaves and cattle, and the edict simply extended the idea by creating an implied warranty against undisclosed faults. It was immaterial that the seller was ignorant of the faults; indeed if he knew of the faults and concealed them, he was guilty of fraud (*dolus*) and was liable for damages resulting from the

fault. There was an implied warranty against fraud on the part of the seller, and an agreement exempting him from responsibility for fraud was void. (Williams, 202; Dig. 13, 6, 17.)

An action could be maintained on an express warranty, but mere praising or puffing of the thing by the seller was not construed into a warranty.

Note. It will be observed that the rule of the Roman law as to implied warranty was exactly the reverse of the English rule of *caveat emptor.*

§ 102. Contract of Hire—In General. The contract of hire was a contract by which one person (*locator*) agreed to let another (*conductor*) have the use of certain property, or to render certain services or do certain work for such other person, for an agreed compensation. As in the case of the contract of sale, the contract became binding as soon as its terms were agreed upon, and no particular form of agreement was required (Inst. III, 24).

As indicated in the definition, there were two general forms of contracts of hire, the hire of things and the hire of work or services.

§ 103. Hire of Things (Locatio—Conductio—Rerum). The hire of things includes the hire of all kinds of property, whether houses, lands, or chattels. The Roman law did not, except to a very limited extent, make any distinction in law between real and personal property as these terms are understood in English law. The law relating to the hire of lands and houses corresponded to the English law of landlord and tenant or leases of real property; the hire of chattels corresponded to the English law of bailments. The Roman *locator* was the same as the English landlord or lessor where the subject-matter of the contract was land or a house, and was the same as the English bailor or letter where the subject-matter was a chattel. In the case of the hirer of lands

or houses, however, certain special terms were employed. The hirer of a house (*prædium urbanum*) was called *inquilinus,* and the rent he paid was called *pensio.* The hirer of a farm was called *colonus,* and the rent he paid *reditus* (Hunter, 507).

The contract of hire created only a right *in personam* and not a right *in rem.*

§ 104. Rights and Duties of Parties. It was the duty of the landlord (*locator*) to deliver the property to the tenant (*conductor*) and to permit him to keep it for the time agreed upon. If the tenant was deprived of the property before the termination of his lease in consequence of the landlord's fault, the latter had to pay him full compensation (*id quod interest*). But if the landlord was not in fault, the tenant was entitled only to a remission of the rent. Thus, if a farm let to a tenant was confiscated, or a house burned, the tenant was entitled simply to remission of the rent. So in case of a chattel, if it was carried off by robbers, the hirer was released from payment for the unexpired term of the contract. If the lessor of a house determined to pull it down and rebuild it during the term, he had to pay the lessee compensation if the rebuilding was unnecessary, but if necessary, he was required simply to allow a remission of the rent.

The landlord was also required to keep the property in good order and in condition for the agreed use. He had to make material repairs or the tenant might claim a reduction from the rent or a release from the contract. But the hirer was required to make trifling repairs. Thus the tenant of a house might throw up the contract if the doors and windows decayed and were not repaired, or if his light was shut out by the erection of a building by an adjoining proprietor. If for the purpose of making repairs the landlord required the tenant to leave during the repairs, the tenant paid no rent for the time he was kept out, and if kept out for more than six months he could throw up the lease.

Again, since the parties were required to do whatever good faith demanded, the lessor of a farm was required to allow a reduction or remission of rent in bad years when the crop was lost or seriously damaged by storms, floods, locusts, etc.

There was also an implied warranty on the part of the owner, that the thing hired was fit for the use intended. Thus where a landlord leased a farm with vats used in wine making, and the tenant's wine was lost because the vats were rotten, it was held that the lessor must pay for the wine. So the lessor of pasture-land that produced poisonous or injurious herbs was bound to remit the rent, if he did not know of the fault, and to pay all resulting damages, if he did know.

The tenant had a right to remove moveables he brought upon the land or into the house, and even to remove fixtures, provided he gave security not to injure the house, but to leave it as he found it. And he was also entitled to compensation for improvements made by him unless they were a part of his contract.

The tenant was required to keep the property for the agreed term, and if without reasonable excuse he left the land or house, he had to continue, nevertheless, to pay rent. He was also bound to take all reasonable care of the property, but he was not liable for loss or injury without his fault. The hirer was bound to return the property at the time agreed, and he must surrender possession even if he claimed the property as his own. For a tenant to contest his landlord's title was made a finable offense. Special agreements, as that the tenant should not have fire in the house, were binding, and the tenant was liable for damages caused by non-observance. The tenant had to pay interest if in arrears in payment of rent, and could be evicted if in arrears for two years (Hunter, 508-511).

§ 105. Hire of Services or Work (Locatio-Conductio Operarum). This was the case where one person hired another to perform certain services or do certain work. There

were two cases; one where the hirer employed the other to perform services not in respect to a particular thing, such as the services of domestic servants, laborers, clerks, etc., and the other where a person was hired to do work upon a particular thing, such as to repair a coat, make a ring, or carry goods. In such case the agreement was not to supply the hirer with a certain amount of labor, but with the result of labor.

(1) The first class of contracts was called *locatio-conductio operarum*. The employer was called the *conductor operarum* and the servant or employee the *locator-operarum*. The subject-matter of this contract must always consist of services of the inferior sort (*operæ illiberales*) not requiring special skill, and reducible to a money value. The services of a lawyer, physician, teacher, mandatory, and the like, were deemed of too high a sort to be debased by being made the subject-matter of trade. They were (in theory) beyond money valuation.

(2) The second class of *locatio-conductio* was called *locatio-conductio operis*. Here the contract was to do certain work upon or in respect to a particular thing. The employer in this case was called, not the *conductor*, as in the former case, but the *locator*, and the person employed was the *conductor*. The nomenclature of the jurists is here somewhat confused, they having apparently followed the analogy of a letting for use in which the bailor is the *locator* and the bailee is the *conductor* (see Hunter, 511). Thus the laundress who washes the clothes, or the carrier who carries the goods or the jeweller who repairs a ring, was the *conductor*, while the owner was the *locator*.

It may be noted that the Roman jurists, like our own, experienced some difficulty in distinguishing between a sale and a contract for work. Thus if a goldsmith agreed to make out of his own gold a ring for Titius, and received ten *aurei* therefor, it was disputed whether this was a contract of sale

or of hire. One authority (Cassius) held that it was both a sale of the material and a hiring of the labor. But it was finally determined to be a sale. But if Titus provided the gold or simply agreed to pay for the work, it was a contract of hire (Inst. III, 24, 4).

The workman was bound to do his work with reasonable care and skill, and take good care of the thing entrusted to him. If it was lost, destroyed, or injured, through his negligence or want of skill, he was responsible, but not otherwise. Thus, if a precious stone was sent to a lapidary to be cut or set, and the lapidary broke the stone in doing so, he was liable if the fracture was due to his want of skill, but not if due to a flaw in the stone. So, if one agreed to carry an article for hire, and it was lost or injured, the carrier was liable if the loss was due to his fault, but not otherwise. (The Roman law did not make the distinction made in English law between a common carrier (liable as insurer) and a private carrier.) (As to contracts of hire, see generally Gaius, 3, 142-147; Inst. III, 24; Hunter, 505-514; Sohm, 404.)

§ 106. Partnership (Societas)—In General. A partnership in Roman law was an association of two or more persons under a contract by which they combine their property, or their labor, or their property and labor, with a view of sharing their common gains. The term does not seem to have been defined by the Roman writers.

The Roman partnership, like the English, involved the sharing of profits and losses. In the absence of special agreement on the subject, an equal sharing of both profits and losses was understood. It might be agreed, however, that the shares should be unequal, as that one of two partners might receive two-thirds, and the other only one-third, of profits and bear losses in the same proportion, or that one partner might take two-thirds of the profits and bear only one-third of the losses, though this last point was decided

only after some difference of opinion. And one partner might take a share of the profits without bearing any of the losses. Profit sharing in some proportion seems to have been essential. There could be no partnership where one of the parties was to share losses only without sharing profits. Such an arrangement was not a true partnership but was known as *leonina societas.*

A partnership was formed by the simple consent of the parties, no special form of contract being necessary. Consent was essential, and one partner could not dispose of his interest in the partnership so as to make the transferee a partner in his place.

§ 107. The Several Kinds of Partnerships. There were several different types of partnership, the most important being (1) Trade Partnerships, such as partnerships of bankers and money lenders. Neither partner was liable to account for any of his gains except in connection with the partnership business, nor to bear any but the business losses. (2) Partnership for a Single Transaction, as where Cornelius owning three horses and Licinius owning one horse agreed to sell them as a single team and divide the proceeds. If before the sale the one horse died, the question whether Cornelius should bear three-fourths of the loss depended upon the terms of the agreement. If the partnership was only for the sale of the team, then until the sale there was no interchange of ownership, and the loss fell wholly on Licinius. But if the agreement was to make a team of four, Cornelius having a three-fourths interest and Licinius having a one-fourth interest, the loss had to be divided in proportion to their shares, unless otherwise agreed. (3) Universal Partnership. This was a partnership in which the partners put together as common property all their property however acquired, and out of this paid all their expenses. All the property owned by each of the partners at the time of the agreement became at once, by virtue of the mere agreement, the

common property of all. But property subsequently acquired by a partner did not become common property until delivered to the copartners.

§ 108. Capital of Partnership. All the partners might contribute both capital and services, or one might contribute all the capital and the other merely services. And there might be a partnership of services only, as where two persons entered into a partnership to teach grammar and share the profits (Dig. 17, 2, 71). There could be no partnership, however, where one party contributed nothing, neither property nor services.

§ 109. Rights and Duties of the Partners Inter Se. The contract of partnership being a *bonæ fidei negotium*, each partner was bound to do not only what he had agreed to do, such as to contribute to the common stock the property agreed, or to divide profits, but whatever else good faith required. He was entitled to reimbursement for all proper expenditures, and to be indemnified in respect of obligations incurred by him in the partnership business. He was liable to his copartner for fraud or wilful default, but he was not bound to show more diligence in the partnership business than he did in his private affairs, the reason for this being that if a man chooses as his partner a careless person he has no one to blame but himself.

Every partner had the *actio pro socio* against his copartners to enforce his rights *in personam*, and the *actio communi dividundo* for a division of the partnership property. There was, however, a special benefit in favor of the defendant partner, that he could not be made to pay more than he could pay without being reduced to destitution (*beneficium competentiæ*), a benefit which was not conceded to a partner who denied the existence of the partnership (Williams, 284; Sohm, 289).

§ 110. Rights and Duties of Partners as to Third Persons. A partnership had in Roman law no existence as to third persons. It could not act, hold property, nor render itself liable. Third persons knew the partners only as individuals. There was, therefore, no Roman law of the relationship of partners and third persons, a subject which figures so largely in the English law of partnership. The reason for this striking difference between the Roman and the English law doubtless lay in the fact that the doctrine of agency was practically unknown in Roman law, and hence one partner could not act so as to bind his copartner or the partnership. All his dealings with third persons were his acts as an individual.

§ 111. Dissolution of Partnership. If no term was fixed by agreement for the duration of a partnership, its continuance depended upon the continuing consent of the partners. In such case even an agreement that a partner could not withdraw was void. Any partner could work a dissolution of the partnership by notice of withdrawal to his copartners, provided, however, the withdrawal was in good faith and not for the purpose of defrauding the partners, or would not result in inconvenience or loss to the partnership. If the partnership was for a fixed term, a partner who withdrew before the expiration of the term divested himself of all rights in respect of the partnership, but remained liable for all its obligations (*socium a se, non se a socio liberat.* Dig. 17, 2, 65, 6).

The death of a partner dissolved the partnership, even where there were several surviving partners, unless it was agreed otherwise. And when the partnership was formed for a particular purpose, it was terminated when that purpose was accomplished. So also, where the partnership was for a definite period it terminated with the expiration of that period. There were other modes of termination of less present in-

terest. (As to partnership, see generally Gaius, 3, 148-154; Inst. III, 20; Hunter, 516-524; Sohm, 406.)

§ 112. Mandate (Mandatum)—In General. Mandate (*mandatum*) was a contract by which one person (*mandatarius*) agreed to do something gratuitously at the request of another (*mandator*), who, on his part, agreed to save him harmless from all loss in so doing. The mandator was said to give the mandatory a mandate, or commission to do the act in question. The term *mandatum* is sometimes translated "agency" (see Moyle's translation of the Institutes), but this translation is misleading. The mandatory is not properly described as an agent.

Mandate was the only gratuitous consensual contract; the others, sale, hiring, and partnership, all being founded upon a consideration. Like the others, it was a *bonæ fidei negotium*, and bound the parties to do all that was required by good faith. It was of the essence of the contract of mandate that the mandatory should act gratuitously. But while this was true in a strict legal sense, it was allowed to agree upon a sum to be paid as a *honorium*, or salary, which might be recovered only by a special action and not by the regular action on the contract of mandate.

Illegal Mandate. A mandate to commit an unlawful act, as to steal or injure the person or property of another, created no legal obligation, and the mandatary could not recover from the mandator even if he performed the act and had to pay a penalty therefor.

Note. The contract of mandate has no counterpart in English law. The English mandate is a bailment of goods, to be carried from place to place, or to have some act performed about them, without reward. This would be merely a special form of Roman mandate. The mandate in some respects resembles agency, but a mandatary did not bring his mandator into direct relations with third persons as an agent does his principal.

§ 113. The Several Kinds of Mandates. The mandate might be either: (1) For the benefit of the person making the request (mandator), as where a man gives another a mandate to buy property for him, or to manage his business. Thus Titius requests Seius to buy him an article for him with his own (Seius') money. Seius buys and pays for the article, but Titius refuses to take it. Seius can recover the price paid and interest. (2) For the benefit of both parties, mandator and mandatary, and where a man gives you a mandate to lend your money at interest to a third person for the good of the giver's property. (3) For the benefit of a third person, only, as where one gives another a mandate to manage the business of a third person, or buy property for a third person. In this case the mandator is merely a surety. (4) For the benefit of the mandator and a third person, as where one gives another a mandate to act in some business common to the giver and a third person, as to buy a farm or make a contract for the giver and a third person. (5) For the benefit of the mandatary and a third person, as where one gives you a mandate to lend your money to another at interest. If it were to lend money without interest it is for the benefit of the third person only (class 3).

It is stated in the Institutes (Bk. III, 26, 6) that a mandate cannot be exclusively for the benefit of the mandatary himself, as where one requests another to invest his money in land rather than to lend it at interest. Such a commission is rather mere advice, and if acted on with loss the loser cannot hold the adviser responsible. The essence of the mandator's obligation being to indemnify the mandatary against loss, it would hardly be reasonable to imply a promise to indemnify one against loss where he was acting solely for his own benefit, but where one requests another to act for the former's benefit or for the benefit of a third person, an undertaking to indemnify may well be implied. The question, as pointed out by Dr. Hunter, turns upon the intention of the

parties (Hunter, 483). Was the request such as to lead the mandatary to expect indemnification? If so, the mandator would be liable even though the mandate was for the mandatary's sole benefit. And if there was an express promise of indemnity, it is a mandate. Thus where a man requested a friend "to set up in your gardens a tennis court, warm baths, and whatever else is necessary for your health at my expense," and the friend accordingly spend 100 aurei in making the improvements, and found on selling the gardens that the price was enhanced only 40 aurei, it was held that he could recover the balance of 60 aurei from his adviser in an action of mandate.

§ 114. Form of Mandate. It was not necessary that the mandate should be given in any particular form of words; it might even be implied from the conduct of the parties. A common form was to give a letter of mandate.

§ 115. Duties of Mandatary. The person requested was not bound to accept the mandate, but if he accepted it, he was bound to do what he had promised, or give it up in time to enable the mandator to act himself or get some one else. Otherwise, he would be liable to the mandator unless his failure to renounce was for some good reason, as sudden illness, a necessary journey, bad feeling between the parties, the mandator's insolvency, etc. Even though he had accepted the mandate he might renounce it, if done seasonably, provided the mandate was gratuitous. If a consideration was to be paid, the mandatary could not renounce without liability for damages. If no damage resulted there was no liability.

In executing the commission given him, the mandatary was required to conform at least substantially to its terms, and to act honestly, and with as much care as a good *paterfamilias*. For failure in these respects he was liable to an action for damages by the mandator (*actio mandati directa*). He was not liable for accidental loss unless he had so agreed.

In the care of any property entrusted to him he was bound to show ordinary care, not being liable only for wilful default (*dolus*) like a gratuitous depositary, a distinction for which no good reason appears. The mandatary was bound to surrender to the mandator everything he gained by the performance of the mandate, including rights of action against third persons, upon which the mandator could sue in the name of the mandatary. In this way a relation very much like agency was established. If the mandator had been permitted to sue the third person in his own name it would have been a true case of agency.

§ 116. Duties of Mandator. The mandator was bound to reimburse the mandatary for all proper expenditures in the performance of the mandate, to accept what the mandatary bought for him, and to indemnify him against all obligations incurred. In other words, he was to see that the mandatary lost nothing by the proper performance of the mandate. The mandatary gained nothing, the act being gratuitous, but on the other hand, he could lose nothing unless guilty of fault in the performance of the mandate. The mandatary was considered as acting for the mandator, not for himself, and his claim against the mandator grew out of the fact that he had performed the mandate at the instance of the mandator and it would be a manifest breach of faith for the latter to refuse to reimburse or indemnify him. If the mandatary had not performed the mandate, he had no right of action against the mandator. For the enforcement of his rights against the mandator the mandatary had the *actio mandati contraria*. And if compensation was agreed upon, he might recover it in a special action (*persecutio extra ordinem*).

§ 117. Termination of Mandate. The mandate might be revoked so long as it had not been acted upon, but the mandator was not permitted to revoke the mandate after

partial performance in order to escape his liability to the mandatary. The mandate might also be terminated by renunciation by the mandatary, or by the death of either party. But if the mandatary performed the mandate in ignorance of the death of the mandator, he could maintain an action for indemnification. (See generally as to mandate, Inst. III, 26; Gaius, 3, 155-162; Hunter, 482-489; Sohm, 407.)

§ 118. Pacts. Except in the case of the consensual contracts, the Roman law never recognized a mere oral promise or agreement as amounting to a contract in the full legal sense. To be binding, the promise must be expressed in a certain form, as in the case of the verbal contracts, or have induced performance, as in the case of the nameless contracts. Nevertheless, mere informal promises or agreements were not entirely without legal effect. As a rule they were not directly enforceable by actions, but they were available as defenses.

These agreements were called pacts (*pacta*). Agreements enforceable by action were called contracts (*contractus*). As early as the Twelve Tables an informal agreement to waive an action for a tort (delict) was held binding, and constituted a good defense to the action. Afterwards the prætor admitted pacts as defenses to actions on contracts as well as on delicts.

A contract could not, strictly speaking, be discharged except in its own appropriate manner. A contract made *per æs et libram* could be discharged only in the same way; a stipulation by a stipulation, and a literal contract by a writing. In law a verbal release or discharge from a formal contract was a nullity. But where a contract had in fact, though informally, been released, the prætor, acting upon equitable principles, permitted the debtor, if sued on the contract, to plead the informal release as a special defense (*exceptio pacti conventi*). The contract was not technically extinguished unless the formal mode of release was employed. It would

still support an action. But this action could be defeated by the equitable defense of an informal release.

The result of this innovation by the prætor was to do away with the necessity for formal releases of formal contracts, and substitute therefor the informal release by pact. A pact not actionable was called a *nudum pactum,* a term which is employed in English law in a very different sense, to denote an agreement not supported by a valuable consideration. The Roman maxim was *Nuda pactio obligationem non parit, sed parit exceptionem* (Dig. 2, 14, 7, 4).

A pact differed from a stipulation only in form. Both were oral promises, but the promise by stipulation was required to be in answer to a question, while the pact was not. Pacts of the kind just described gave rise to a "natural obligation" (*naturalis obligatio*).

Pacta Adjecta. Pacts were also used in connection with contracts as collateral agreements annexing terms not included in the contract proper. These added pacts (*pacta adjecto*) were actionable. Thus if in a contract of sale a penalty was agreed upon for delay in performance, this penalty could be recovered in an action on the contract of sale.

These pacts were employed with contracts *bonæ fidei,* and perhaps to a limited extent with contracts *stricti juris.* In the case of contracts *bonæ fidei,* good faith, of course, required that the parties should perform whatever collateral agreements they made at the time of the contract. In early times these collateral agreements could be added only by stipulation, and were enforced in an action on the stipulation, but it was later held that all terms contemporaneously added to a contract *bonæ fidei* were a part of the contract and of equal validity with it, and could be enforced by the same action as the contract itself. To have this effect, the pacts had to be made at the time of the contract. Subsequent pacts modifying or varying the terms of the contract, or wholly or

partially dissolving it, were available only as a defense to an action on the contract.

Special Pacts. In a very few cases pacts not collateral to any contract were made actionable by the prætor or by imperial legislation. Two, the pact of *hypotheca* (mortgage) and the *pactum de constituto* (a form of suretyship), were due to the prætor, and two to the emperors. It was enacted in A. D. 428 that a mere agreement to give a dowry should be binding without any stipulation (*pactum de constituenda dote*), and Justinian enacted that an informal promise to make a gift should be binding (*pactum donationis*). In this enactment Justinian was probably largely influenced by his desire to give legal force to gifts for religious and pious uses. (As to pacts, see Hunter, 545-550; Sohm, 414.)

§ 119. **Suretyship.** The Roman law of suretyship was quite extensive. Not less than five forms of suretyship were employed at different times, but in Justinian's time the principal form in use was that known as *fidejussio*. The contract of suretyship was made by stipulation, though the principal debt might arise out of any form of contract or out of tort. The creditor would ask *centum quæ Titius mihi debet, eadem fide tua esse jubes?* The surety (*fidejussor*) replied *"fide mea esse jubeo."* The surety bound both himself and his heirs. The contract of suretyship might be made after as well as before or at the time of the principal contract. Women were prohibited by the *Senatus consultum Valleianum* (A. D. 46) from becoming sureties.

The surety was bound to pay the creditor in case of the default of the principal debtor, but according to the earlier law the creditor could not sue the surety without first proceeding against the debtor. If the principal debtor was beyond the jurisdiction, the surety could not be sued. During the Empire this rule was changed so as to give the creditor the option of suing either the principal or the surety.

Justinian (Nov. 4, 1) restored the old rule with modifications by providing that if the principal debtor were within the jurisdiction he must be first sued or have made default, before the surety could be sued, except that bankers (*argentarii*) might first sue the surety, and if the principal were out of the jurisdiction, the surety might be sued.

If the surety paid the debt, he had a right of action (*actio mandati*) against the principal debtor for reimbursement. And the creditor was bound to turn over to the surety all the rights in rem, such as pledges (*pignora*) and mortgages (*hypothecæ*) he held over the property of the debtor or others securing the debt. But if these rights were also held to secure other debts, he could not be compelled to surrender them until all the debts were discharged. (Hunter, 569.)

§ 120. Cosureties. Until the time of the Emperor Hadian (A. D. 117-138) if there were two or more cosureties for the same debt, each was liable to the creditor for the whole amount, and a surety who was required to pay the debt could not call upon his cosureties for contribution. He could, however, before paying the debt, require the creditor to transfer to him his rights of action against the other sureties, and thus secure contribution. Technically, the payment of the debt would extinguish it, and as there was only one debt for which all the sureties were liable, there would remain no rights of action against the other sureties after one surety had paid the debt. There would, therefore, be nothing to transfer. To avoid this difficulty, it was considered that the surety who paid the debt did not pay it, but rather bought the creditor's rights against the other sureties, and accordingly he could not be required to pay without a surrender of the creditor's rights against the other sureties. And the transfer, or an agreement therefor, must take place before the payment, or the payment would be considered as such and extinguish the debt and with it all rights against the cosureties. The Emperor Hadian provided that a surety

sued for the debt could compel the creditor to sue for only the defendant's proportionate share as determined by the number of sureties who were solvent when the suit was brought, the share of insolvent sureties being divided among the others. A surety who omitted to take advantage of this privilege and paid the whole debt had no right of contribution. (As to suretyship, see Gaius 3, 115-127; Inst. III, 20; Hunter, 565-579; Sohm, 384.)

§ 121. Agency—In General. In the early Roman law of contracts the notion of agency was entirely lacking. Only the person who actually participated in the making of a contract was bound by it or could claim any rights under it. In later times the prætor, under the pressure of commercial necessity, created a law of agency closely resembling, in some striking examples, the modern law, but even down to the close of the Empire the law of agency in the modern sense was unknown to the Roman law. The Romans were very slow to grasp the principle of representation by an agent, and only in exceptional cases and in an imperfect manner was the principle recognized and applied.

It may strike one with surprise that the practical-minded Romans failed to develop a branch of law so indispensable in modern business life. For this failure two reasons may be assigned: In the first place, the rule that everything acquired by a slave or by a person under power belonged to the master or *paterfamilias*, removed to some extent the necessity for a true law of agency. The master might send his slave, or the father might send his son, to make a contract, which would be made by the slave or son in his own name with the other party, and the benefit of the contract, as stated above, would accrue to the master or father. The slave or son was thus a sort of an agent, and it may be true that in English law master and servant are held to be one person "by a fiction which is an echo of the *patria potestas*" (Per Holmes, J., in Dempsey *v.* Chambers, 154 Mass. 330).

The second reason is that the strict formalism of the early law precluded the employment of agents in the making of contracts. The juristic acts of the early *Jus Civile* derived their legal force solely from their form, and these forms in very early times were highly ceremonial, and to a certain extent sacred or sacramental in character. It would have appeared incongruous to the early Romans for a person to acquire rights or incur liabilities by a ceremony or form to which he had not been a party. Hence all contracts had to be made personally.

It is impossible, however, in civilized society to get along without some form of agency. No man can do everything in person. And while the Roman law did not recognize agency in the modern sense, it did provide a fairly satisfactory substitute therefor. It approached, though it never fully reached, a true law of agency.

§ 122. Agency of Persons Alieni Juris. The principal Roman substitute for agency is found in the Roman family law. The Roman law of agency may be described as an application of family law just as the English law of agency is an application or extension of the law of master and servant. It was the rule that all rights acquired by a person under the power of another (whether children *in potestate,* wives *in manu,* free persons *in mancipio,* or slaves) belonged to the person in whose power he or she was.

The usual application of the rule was to acquisitions by slaves. The prætorian law greatly limited the rights of a *paterfamilias* in the acquisitions of his son. The principle that whatever a slave acquired he acquired not for himself but for his master, was not truly that of agency according to the English conception of representation. The master became the owner of property acquired by the slave, and the master, not the slave, could sue on the slave's contracts, but the master acquired his rights by operation of law and not by virtue of his having authorized the slave to act for him.

The same result would follow although the slave acted without the knowledge of his master, or even contrary to his express command. The slave was a mere "mechanical medium for transmitting rights, not an authorized agent to contract them." (Hunter, 611.) The acquisitions of a slave belonged to the master just as the increase of animals belonged to the owner of the animals.

By the *Jus Civile* the slave could only acquire rights for the master, he could not subject him to contractual liabilities. "Our condition can be made better by our slaves, it cannot be made worse," was the maxim of the law (*melior conditio nostra per servos fieri potest, deterior fieri non potest.* Dig. 50, 17, 133). A slave, therefore, could make only unilateral contracts for his master, not contracts involving reciprocal duties. He could stipulate for his master, but he could not buy or sell. This defect of the *Jus Civile* was remedied by the prætor, who gave two actions against a father or master on contracts made by a son or slave. These were the *actio quod jussu* where the contract was made by the order of the father or master, and the *actio de in rem verso,* where, without such authority, the contract was made for the benefit of the property of the father or master. The latter case included all reasonable and proper beneficial expenditure, such as for the repair of the father's or master's house, or the cultivation of his land, necessaries for sons or slaves (including the one making the contract), etc. In these two cases we find examples of a true agency; in the first case the son or slave acted with express authority, and in the second case with authority imputed by law. The contract was the contract of the father or master, who alone could sue or be sued on it; the son or slave had no interest in it.

§ 123. Agency of Shipmasters and Business Managers. There were two special instances of a purely commercial character in which persons *sui juris* as well as slaves and persons under power might act practically as agents.

The master or captain of a ship (*magister navis*) might bind the owner (*exercitor*) by contracts relating to the ship and its business. And a person (*institor*) put in charge of a shop or other business could bind his principal by contracts within the scope of the business entrusted to him. These were the only cases in which persons not slaves nor under power could act as agents, and they were agents only in a partial sense. Their contracts bound their principals, and third persons with whom they contracted could sue the principals directly on the contracts. But except in a few cases the principal could not sue the third person directly. His only remedy was against the shipmaster directly or against the manager to compel him to transfer his right of action. Moreover, unlike a true agent, the master of the ship or manager of the business was personally liable on his contracts.

The remedy granted by the prætor against the principal was the *actio exercitoria* in the case of the shipmaster, and the *actio institutoria* in the case of the manager. These two actions together with the quasi-agency or slaves and persons under power probably served fairly well the needs of the Romans.

§ 124. Mandatary as Agent. A mandatary was bound to give up to his mandator all rights acquired against third persons by the performance of the mandate, and permit the mandator to sue in his name. The mandatary made the contract in his own name, and the mandator would sue thereon in the name of the mandatary, and in this round about way the function of an agent was served by the mandatary. (As to agency, see generally, Hunter, 609-626; Sohm, 219-224.)

§ 125. Adstipulation. In the early Roman law a relation amounting practically to that of agency was established by the introduction into the contract of stipulation of an associate creditor called an adstipulator. The principal

creditor (stipulator) would stipulate for a certain thing from the debtor, and the adstipulator would then stipulate for the same thing from the same debtor. The debtor was now liable to both creditors and might pay either, though a single performance discharged his entire obligation. The adstipulator, being formally a creditor, had the same right to demand performance as the stipulator, but he was bound to turn over to the stipulator, as the actual creditor, or to his heir, what he obtained from the debtor. The adstipulator had also the same power as the stipulator to release or discharge the debtor, but if he did so gratuitously so as to deprive the stipulator of the benefit of the contract, he was liable under the Aquilian law to an action for damages, as well as to an action on the contract (*actio mandati*).

Adstipulation was employed to get around two narrow rules of the ancient law. One of these was the rule that only the creditor in person could sue on a debt. This was evaded by making the adstipulator formally a creditor and hence entitled to sue. The other rule was that the benefit of a stipulation was available only to the stipulator and not to his heirs. This was evaded by requiring the adstipulator to surrender to the stipulator *or to his heirs* whatever he obtained from the debtor. This duty was enforceable by the *actio mandati*.

The former rule became obsolete with the introduction of the formulary system of procedure under which a creditor might give another person a mandate to sue for him. The latter rule was abolished by Justinian. There being now no longer any necessity for it, adstipulation was obsolete in the time of Justinian. In earlier times, however, it was frequently employed in commercial dealings, and there were people who acted as professional adstipulators. The object of the stipulator being to secure the services of a particular person as agent, the rights of the adstipulator were personal and did not pass to his heirs but ceased on his death. (See Gaius, 3, 110-114, 117; Hunter, 563; Sohm, 389.)

§ 126. Transfer or Assignment of Obligations—In General. Under the *Jus Civile* obligations were not assignable. This is, the creditor could not directly transfer to another his right against the debtor. But by the use of a mandate he could indirectly accomplish this result. The creditor, in addition to giving the intended transferee a commission to sue as the creditor's agent or attorney (*procurator*) for the amount due, would agree further that he might retain the amount recovered as his own. This was called a *mandatum in rem suam*, and the mandatary was called a *procurator in rem suam*. Instead of acting as attorney for the creditor, he was, in effect, attorney for himself. The suit was brought in the name of the original creditor, but the judgment was rendered in favor of the transferee. Thus, suppose Titius, having a claim against Gaius, wished to transfer it to Maevius. He would give Maevius authority to sue Gaius in his (Titius') name. The formula in the action would read thus: "If it appears that Gaius owes Titius 10 aurei, then let the judex condemn Gaius to pay 10 aurei to Maevius." (Gaius, IV, 86.)

This form of mandate, like any other, was revocable by the original creditor, or by his death, up to the time of bringing the suit (*litis contestatio*). Until the suit was brought, there was no direct relation between the transferee of the claim and the debtor. But after the suit was brought the transferee was a party to the action, and had control thereof—he became *dominus litis*—and the original creditor could not revoke the mandate. This was true of any procuratorial mandate.

There was no difference in the formula employed, or in its outward effect generally, between a mandate *in rem suam* and any other procuratorial mandate. In either case, the mandatory was, as to the debtor, not a creditor, but merely the procurator of the original creditor. The only difference was that the procurator *in rem suam* was not bound to hand over to the mandator the amount recovered from the debtor.

This mode of transfer, which involved the actual bringing of suit on the claim before the transfer became effective, was obviously cumbersome, and unsatisfactory. And in course of time it became a rule of law that a *mandatum in rem suam* should be irrevocable from the moment notice thereof was given to the debtor, and not simply from the time suit was brought. From the time of notice, then, the mandatary *in rem suam* had a right to claim payment from the debtor. The assignment was thus accomplished not by the actual bringing of the suit, but by authorizing a suit to be brought and giving notice to the debtor. Finally, the prætor completed this cause of development by doing away altogether with the necessity for the mandate *in rem suam,* and recognizing assignments in any form, whether by sale, gift, or otherwise, in which the intention to assign was manifested. The prætor granted to the assignee an action said to be founded on utility (*actio utilis*), the precise form of which has not come down to us, in which the assignee sued in his own name. The consent of the debtor was not necessary to the validity of the assignment, but he was not bound by the assignment until notified thereof. If, without having received notice, he paid the original creditor, he could not be required to pay again to the assignee. And after notice the debtor could not pay the original creditor.

§ 127. Incidents of Assignments. The assignor of a right of action was bound, unless otherwise agreed, to transfer with the principal right all subsidiary and accessory rights against the debtor, for example, all mortgages, including even any that might be acquired after the assignment. He did not warrant the solvency of the debtor, but only that the debt was due. Until the assignment was completed by notice to the debtor, the assignor could sue the debtor, but he was bound to turn over to the assignee the sum recovered. After notice, only the assignee could sue. The debtor could set

up against the assignee any defenses he had against the assignor.

§ 128. Restriction on Assignment. In order to put a stop to the oppression of debtors by the purchase of debts for less than their amount, it was enacted during the later Empire that the transferee of a debt should be permitted to recover from the debtor no more than he had paid for the debt to the transferer, with lawful interest.

§ 129. Discharge or Extinction of Contracts—Performance. The obligation of a contract might become extinguished in several ways of which we will notice three, as follows: By (1) actual performance or its equivalent, (2) release by the creditor, and (3) prescription.

Every obligation might be extinguished by the actual performance due, or by the performance of something else in its place with the creditor's consent. It was immaterial who performed, whether the debtor himself, or someone else in his behalf; the debtor was released by performance by a third person, whether he knew of it or not, and even though performance was against his will (Inst. III, 29, 1). This was in accordance with the principle that one might enrich, though not impoverish, another without his consent (Dig. 46, 3, 23; 53; Dig. 3, 5, 39). Performance by a third person, however, had to be in the name and on account of the debtor. And where the nature of the obligation rendered performance by a third person impossible, as in the case of contract for personal services, performance by a third person, unless accepted by the creditor, did not discharge the debt (Dig. 46, 3, 31).

Performance by the debtor released both himself and his sureties, and, conversely, performance by a surety released both the surety and the principal debtor (Inst. III, 29, 1).

§ 130. Incidents of Payment. It was a disputed point

whether the creditor could be compelled to accept a part only of the debt, but it was held that he might require the creditor to accept part payment as a discharge *pro tanto* of the debt (Dig. 12, 1, 21).

Application of Payments. The rules as to application of payments where a debtor owed several debts to the same creditor and made payments amounting to less than the total obligation, were in favor of the debtor. The debtor might, at the time of payment, apply the payment to the debt he intended to discharge. If the debtor made no application, the creditor might apply the payment to whichever debt he pleased, with this important qualification, that he must apply it to the debt which he himself, if debtor, would have wished to have discharged. (Code, 8, 43, 1; Dig. 46, 3, 1; Dig. 46, 3, 94, 3.) If neither party applied the payment, as between a principal debt and interest, the interest was first paid off, and as between principal debts, the payment was applied to the debt most burdensome to the debtor. (Code, 8, 43, 1; Hunter, 635.)

Receipts. A receipt (*apocha*), or written acknowledgment of payment, given by the debtor was considered stronger evidence of payment than the surrender to the debtor of the written evidence of the debt, but it was not conclusive, and bound the creditor only to the extent of the actual payment. (Hunter, 636; Code, 8, 43, 6.)

§ 131. Tender. Tender might consist in a simple offer to pay (*oblatio*) or in a formal tender by depositing the money due in a sealed bag either in a temple or in some other place by order of a court (*depositio et obsignatio*). (Code, 8, 43, 9; Code, 4, 37, 19.) It is not clear whether the formal tender was more effective in discharging the debt and its accessories, such as interest and securities, than the informal offer, but it seems that the debt itself was discharged

by either mode. Thus where a debtor took the money to the creditor for the purpose of paying the debt, but the creditor, without good reason, refused to take the money, and the debtor accidentally lost it on the way home, it was held that the debtor could not be compelled to pay the money. (Dig. 46, 3, 72.) In the case of money deposited, the creditor's only remedy was against the depositary. (Hunter, 637.)

§ 132. Impossibility of Performance. As we have seen, a promise to do an impossibility, that is, something which no one, not merely the promisor, could do, was void. Such a promise created no obligation. And the rule was, in effect, the same, where performance became impossible after the promise was made. If the impossibility arose without the fault of the promisor, he was discharged. Thus, if Titius promised Gaius a certain chest of money, or a certain slave, and, without the fault of Titius, the chest and money were lost, or the slave died, Titius was released. Or if Sempronius promised to give to Maevius a plot of ground belonging to another, and before performance the owner buried a dead body in the land and so made it *extra commercium* Sempronius was discharged. But if the land belonged to Sempronius and he himself buried the body in it, he was liable to Maevius for its value, the impossibility being caused by his own fault. (Hunter, 637.)

§ 133. Release. Releases were either formal or informal. The formal release belonged to the *Jus Civile* and the informal release to the prætorian law. It was a principle of the *Jus Civile* that a debtor could be released from his obligation only by a proceeding analogous to that by which he had bound himself. According to the older law, even payment or performance (which was sufficient under the prætorian law) did not discharge the debt unless the payment or

performance was in due legal form. To constitute legal payment or performance, there must be not only the actual satisfaction of the creditor, but such satisfaction must be expressed in legal form. The actual payment or performance had to be accompanied by the formal legal discharge of the debtor. (Compare the old rule of the English law that a bond, an obligation under seal, could be discharged only by a release under seal.)

At a time when a contract derived its legal force from the observance of a form, it was not unreasonable that a corresponding form should be required to extinguish the contract. And as the extinguishment of the obligation was attributed to the formality employed and not to actual performance, it came about that in the *Jus Civile* of the classical period the formal modes of extinguishing contracts took the form of a mere fictitious or imaginary payment. This formal discharge or release was by the use of a *contrarius actus,* or act reversing the prior act by which the obligation was created. Thus a contract created by mancipation was dissolved by a similar proceeding *per æs et libram* with contrary words; a contract by stipulation was dissolved by a contrary stipulation or acceptilation (*acceptilatio*); a contract formed by writing (*expensum ferre*) by a contrary entry of the money as having been received (*acceptum ferre*) or literal acceptilation. These formal methods of release amounted to an acknowledgment of a fictitious performance. Their effect was to extinguish the obligation and release all sureties, pledges, etc.

As stipulation was the principal formal contract, acceptilation was the principal mode of release. The debtor asked the creditor "Do you regard as received that which I have promised you?" (*quod tibi promisi, habesne acceptum?*), and the creditor replied "I do" (*habeo*). This very simple and convenient mode of releasing obligations was applicable only to contracts by stipulation. Other formal contracts must be

released by their more cumbrous contrary forms. But by an ingenious application of the principle of novation, Aquilius Gallus, a colleague of Cicero, made acceptilation applicable to obligations of every sort. The obligation to be released was first reduced to the form of stipulation, and then released by acceptilation. The formula by which this was accomplished, known as the Aquilian stipulation, is preserved in the Institutes (Inst. III, 29, 2). The consensual contracts were released by simple contrary agreement (Inst. III, 29, 4).

Informal Releases. The Roman law at first recognized only the formal release, but the prætor gave effect to an informal release or agreement not to sue by permitting the debtor to set up such release or agreement as a defense to an action on the debt. And in time such agreements or pacts (*pacta de non petendo*) practically superseded the formal release. The effect of the informal release was not, however, always as extensive as that of a formal release. The latter absolutely extinguished the debt for all purposes. If there were several codebtors, the release of one released all; a release of the principal debtor released the surety, and the release of the surety released the principal. But an agreement not to sue operated only to the extent of the creditor's intention. It might be made subject to conditions, or in favor of some parties and not of others. It was all a question of intention (Hunter, 642-645).

§ 134. Prescription. There was under the *Jus Civile* no limitation of actions by prescription. Rights of action were perpetual and not barred by lapse of time. The principle of limitation was introduced by the prætor, who in granting a right of action would frequently limit it by granting it only for a prescribed period, as for one year. And a general statute of limitations was enacted by the Emperors Honorius and Theodosius II, in 424 A. D., fixing the period of limita-

tions for all actions, with some exceptions, whether *in rem* or *in personam,* at thirty years. The excepted cases were barred after forty years (Hunter, 645-649).

Note. Besides the Roman authorities, the principal authorities consulted in the compilation of these notes have been Dr. Hunter's Roman Law and Sohm's Institutes of Roman Law, to both of which frequent references have been made.